34-1554

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No.....

In The

Supreme Court of the United States

October Term, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner,

v.

CLIFFORD W. CARRIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of the Sixth Amendment, is sufficient to establish the "cause" required to excuse a procedural default under *Wainwright* v. *Sykes,* 433 U.S. 72 (1977).

2. Whether the exhaustion requirement of 28 U.S.C. § 2254 may be circumvented merely because a claim of attorney error is asserted to establish "cause" under *Wainwright* v. *Sykes* rather than as an independent ground for habeas corpus relief.

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Virginia Department of Corrections,

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CLIFFORD W. CARRIER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Allyn R. Sielaff, Director of the Virginia Department of Corrections, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc Court of Appeals is not reported at this time (Pet. App 1). The opinion of the panel of the Court of Appeals is reported at *Carrier* v. *Hutto,* 724 F.2d 396 (4th Cir. 1983) (Pet. App. 3). The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, is not reported (Pet. App. 27).

JURISDICTION

The judgment of the panel of the Court of Appeals was entered on December 27, 1983 (Pet. App. 3). The en banc opinion, on rehearing, was entered on February 7, 1985 (Pet. App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The relevant statutory provision, 28 U.S.C. § 2254, is reproduced at Pet. App. 29.

STATEMENT OF THE CASE

The respondent, Clifford W. Carrier, was convicted of rape and abduction in March 1977. Prior to trial, counsel for respondent moved for discovery of the victim's statements. The judge examined the statements, found that they were not exculpatory and denied the motion. Carrier's counsel requested the statements again immediately before trial, but the judge denied the request for the same reason. The statements were ordered sealed and counsel formally objected to the trial court's ruling (Pet. App. 5).

Carrier's notice of appeal to the Virginia Supreme Court assigned as error, *inter alia,* the trial court's ruling prohibiting defense counsel from examining the statements, either prior to or during the trial. However, Carrier abandoned this claim in his petition for appeal. In April 1978, the Virginia Supreme Couurt denied respondent

Carrier an appeal. His petition for writ of certiorari was denied by this Court on January 8, 1979. *Carrier* v. *Virginia,* 439 U.S. 1076 (1979). On February 5, 1980 Carrier filed a habeas corpus petition in state circuit court, alleging that withholding the victim's statements from trial counsel was a denial of due process under the Fourteenth Amendment. The circuit court dismissed the petition because Carrier had failed to pursue this claim on direct appeal.[1] The Virginia Supreme Court affirmed the circuit court's dismissal of the petition by unpublished order of June 12, 1980 (Pet. App. 5-6).

In September 1980 Carrier filed a habeas corpus petition, under 28 U.S.C. § 2254, in the United States District Court for the Eastern District of Virginia, alleging that he was denied due process because the prosecution deliberately withheld the victim's statements from defense counsel and because the trial court denied his descovery request. The Commonwealth moved to dismiss the petition, alleging (1) failure to raise these issues on direct appeal barred collateral attack under *Wainwright* v. *Sykes,* 433 U.S. 72 (1977), and (2) Carrier had not exhausted state remedies.[2] In August 1982, the United States Magistrate recommended dismissal of the petition on the basis of petitioner's procedural default in failing to raise his claims on direct

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[1]Under Virginia law, only errors asserted in the petition for appeal will be noticed by the Virginia Supreme Court (Va. S. Ct. R. 5:21). Errors that could have been raised on appeal may not be raised for the first time in collateral post-conviction proceedings. *Slayton* v. *Parrigan,* 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied sub nom. Parrigan* v. *Paderick,* 419 U.S. 1108 (1975). *See generally Cole* v. *Stevenson,* 620 F.2d 1055 (4th Cir.), *cert. denied,* 449 U.S. 1004 (1980).

[2]As pointed out by the Court of Appeals below, the Commonwealth anticipated that in amended pleadings Carrier might assert ineffectiveness of counsel as the cause for omitting his claim on the state appeal (Pet. App. 6).

appeal (Pet. App. 6). Carrier then filed a "Motion of Objection and Exception" to the Magistrate's report, arguing that his procedural default should be excused because it was "the result of eneffective [sic] assistance of counsel." (Pet. App. 6).

In October 1982, the District Court approved the Magistrate's report and held that the habeas claim was barred by procedural default (Pet. App. 6). The District Court also stated that Carrier must establish "cause" for the procedural default, "in the first instance," in the Virginia state courts (Pet. App. 7).

Carrier appealed this order to the United States Court of Appeals for the Fourth Circuit. In his brief, he asserted ineffective assistance of counsel as "cause" to excuse the procedural bar under *Wainwright* v. *Sykes* (Pet. App. 11). He argued that his attorney's error in failing to pursue an issue on appeal also constituted ineffective assistance of counsel in violation of the Sixth Amendment (Pet. App. 25).[3]

On February 7, 1985, a panel of the Court of Appeals (2-1 decision) reversed the District Court's order and remanded the case for further hearings. The panel stated that the central issue was whether a single act or omission by counsel, insufficient by itself to contravene the Sixth Amendment, may satisfy the "cause" prong of the exception to preclusive procedural default discussed in *Wainwright*. (Pet. App. 9). The panel then held that "attorney error short of wholesale ineffectiveness of counsel can constitute *Wainwright* cause, provided that the act or omission resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy."

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[3]This Sixth Amendment claim was expressly abandoned in oral argument in the Court of Appeals below.

(Pet. App. 11-12). The panel defined attorney error as the failure of trial counsel to exercise judgment, through ignorance or oversight, "in dereliction of the duty" to represent the client. *Id.*

The panel also held the District Court erred in ruling that Carrier must first present his claim of attorney error to the state courts. "The exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." (Pet. App. 14). The panel remanded the case for the District Court to determine "cause,"—*i.e.*, whether counsel's failure to appeal the discovery claim was in fact attorney error or a strategic act by counsel—and "prejudice" under *Wainwright* (Pet. App. 15).

Judge Hall, in his dissent, found there was no basis for remand, because petitioner had not alleged any prejudice and because the alleged attorney error could not constitute *Wainwright* "cause." "Under the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under *Wainwright*), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the *Wainwright* bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule." (Pet. App. 20). Judge Hall also noted the alleged attorney error should have been raised in Carrier's state habeas petition and, "even if petitioner could prove cause and prejudice under the *Wainwright* exception, the case still must be dismissed for failure to exhaust state remedies." (Pet. App. 22).

On February 7, 1985, the en banc court adopted the panel majority's decision in a 5-4 per curiam opinion. The four dissenting judges, including Judge Hall, adopted the panel dissent. (Pet. App. 2).

On March 7, 1985, the Court of Appeals stayed issuance of the mandate, pending the filing of this petition.

REASONS FOR GRANTING THE PETITION

I.

The Opinion Below Renders the "Cause" Requirement of WAINWRIGHT Virtually Meaningless.

This case presents the question of whether a habeas corpus petitioner who has failed to raise a constitutional claim on direct appeal, and who therefore is barred from presenting the claim in state habeas proceedings, may show "cause" under *Wainwright* for his procedural default by establishing that his attorney's ignorance, inadvertence, or oversight was the basis for the default. In *Wainwright*, this Court held that a state prisoner, who procedurally defaults a claim by failing to comply with a state's contemporaneous objection rule, is barred from obtaining federal habeas corpus review of the claim, absent a showing of cause and actual prejudice. 433 U.S. at 87. In holding that the acts or omissions of counsel may constitute "cause," the Fourth Circuit has ignored the decisions of this Court, eviscerated the *Wainwright* decision, and dramatically expanded the scope of federal review available on collateral attack.

The decision below allows any defendant, whose attorney performed at trial or on appeal with diligence and skill but made an isolated error not amounting to ineffective assistance of counsel, to clear *Wainwright's* "cause" hurdle. That hurdle was erected, in part, to protect the legitimate state interest of allowing state courts to correct their errors promptly and to avoid piecemeal review of convictions. *Wainwright,* 433 U.S. at 91. The decision

below[4] ignores the legitimate state interests underlying the *Wainwright* procedural default rule[5] and opens a gap in the "cause and prejudice" exception to the procedural bar that will, as Judge Hall stated in the panel dissent below, swallow the rule itself. (Pet. App. 20).

Practically any non-tactical failure to raise a point can, with benefit of hindsight, be called attorney error. Criminal defendants, however, are guaranteed reasonably competent counsel, not infallible counsel. Fundamental fairness is not undermined unless counsel's error falls below an objective standard of reasonableness. *Strickland* v. *Washington,* ___ U.S. ___, 104 S.Ct. 2052, 2065 (1984).

The decision below will foster the very problems this Court hoped to avert in *Strickland*: "Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense." 104 S.Ct. at 2066. Shadow trials of counsel's competence would be only part of the problem; such "quests for error" would themselves suffer from the prejudicial remoteness of proof that this Court fashioned *Wainwright,* in part, to avoid. 433 U.S. 72, 88 (1977); *see also* 433 U.S. at 112 n.11 (Brennan, J., dissenting).

Moreover, the Fourth Circuit decision here is inconsistent with the legal principles set forth in *Engle* v. *Isaac,* 456

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[4]The Chief Judge of the Fourth Circuit underscored the importance of settling the issue here presented by citing, in at least two related published opinions, this Court's statement that it would define cause and prejudice in an appropriate case. *Satterfield* v. *Zahradnick,* 572 F.2d 443, 447 (4th Cir. 1978) (Winter, J., specially concurring) (deliberate non-objection); *Crowell* v. *Zahradnick,* 571 F.2d 1257, 1262 (4th Cir. 1977) (Winter, J., dissenting) (possibly deliberate non-objection).

[5]All fifty states have procedural default rules. *E.g., State* v. *Abernathy,* 36 N.C.App. 527, 244 S.E.2d 696 (1978); Ohio R. Cr. P. 30; Fla. R. Cr. P. 3.190(i).

U.S. 107, 134 (1982). In *Engle*, this Court explicated the finality, comity, and effective administration of justice considerations supporting the *Wainwright* doctrine. 456 U.S. at 128-129.[6] The Court then held that a habeas petitioner had not established the "cause" required under *Wainwright* to excuse his failure to object to a jury instruction. The Court stated that counsel's failure to recognize, or "unawareness" of, a non-novel claim could not constitute cause for a procedural default:

> [T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

456 U.S. at 134.

The Fourth Circuit's holding that counsel's ignorance or inadvertence can constitute cause thus contravenes this Court's decision in *Engle*. Indeed, several courts, without defining the level of attorney error needed to establish

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[6]The Court stated: "[The habeas writ] imposes special costs on our federal system. . . .

In *Wainwright* v. *Sykes*, we recognized that these costs are particularly high when a trial default has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts. . . . [T]he trial court has had no opportunity to correct the defect and avoid problematic retrials. The defendant's counsel . . . has detracted from the trial's significance by neglecting to raise a claim in that forum. The state appellate courts have not had a chance to mend their own fences and avoid federal intrusion. Issuance of a habeas writ, finally, exacts an extra charge by undercutting the State's ability to enforce its procedural rules. These considerations supported our *Sykes* ruling. . . ." 456 U.S. at 128-129 (footnote omitted).

cause, have noted that an "inadvertence" or "unawareness" excuse would circumvent the *Engle* ruling. *Henderson* v. *Jago,* 681 F.2d 471, 474 (6th Cir. 1982); *see Weaver* v. *McKaskle,* 733 F.2d 1103, 1105-1106 (5th Cir. 1984); *Jones* v. *Jago,* 701 F.2d 45, 47 (6th Cir. 1983).

We submit that this Court should address the collateral review question presented here and reject the reasoning of the court below that renders *Wainwright* virtually meaningless.

II.

The Opinion Below Conflicts with Opinions of Other Circuit Courts of Appeals.

The Fourth Circuit ruled, in the en banc opinion below, that attorney error not constituting ineffective assistance of counsel in violation of the Sixth Amendment may satisfy the *Wainwright* "cause" requirement. In essence, the Court held any non-deliberate or non-tactical error by counsel may excuse a procedural default under *Wainwright.*

The Fourth Circuit decision is clearly in conflict with decisions in several circuits that address the issue of the level of attorney error needed to establish "cause" under *Wainwright.* The Second, Sixth, and Eighth Circuits have held that counsel's negligence, inadvertence, ignorance, or mistake in judgment do not constitute *Wainwright* "cause." In *Long* v. *McKeen,* 722 F.2d 286 (6th Cir. 1983), *cert. denied,* ___ U.S. ___, 104 S.Ct. 1608 (1984), a habeas petitioner argued that trial counsel's incompetence in not objecting to a jury instruction was sufficient to satisfy the "cause" required by *Wainwright,* since it was clear that the failure to object was not a "tactical" decision. 722 F.2d at 288. The Sixth Circuit disagreed, and held that cause is not established by counsel's ignorance of the law or mistake in judgment. 722 F.2d at 289.

In *Tsirizotakis* v. *LeFevre,* 736 F.2d 57, 62 (2d Cir.), *cert. denied,* 105 S.Ct. 216 (1984), the Second Circuit held that if acts or omissions of counsel are asserted as "cause" under *Wainwright,* they must amount to ineffectiveness of counsel "of constitutional dimensions." 736 F.2d at 62. *See also Gates* v. *Henderson,* 568 F.2d 830, 843 n.6 (2nd Cir. 1977) (Oakes, J., concurring). Similarly, in *Dietz* v. *Solem,* 677 F.2d 672, 673-75 (8th Cir. 1982), and *Thomas* v. *Auger,* 738 F.2d 936, 939 (8th Cir. 1984), the Eighth Circuit held that trial counsel's unawareness of a non-novel claim, or trial counsel's oversight or negligence do not constitute cause under *Wainwright. See also Palmes* v. *Wainwright,* 725 F.2d 1511, 1525 (11th Cir.), *cert. denied,* 105 S.Ct. 227 (1984) (court rejected argument that any non-strategic decision by trial counsel would constitute "cause" for a procedural default under *Wainwright.*)

This Court left "open for resolution in future decisions the precise definition of the 'cause' and 'prejudice' standard" in *Wainwright,* 433 U.S. at 87. The conflict in the circuits on whether non-tactical attorney error is sufficient "cause" to excuse a procedural default should be resolved by this Court. The conflict is strictly one of law, and cannot be accounted for on the basis of variations in the factual situations among the cases involved. Therefore, in order to achieve a uniform application of federal law in the federal courts, review by this Court is required.[7]

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[7]This Court has reviewed issues involving the availability of federal habeas corpus review to petitioners who procedurally defaulted on a claim in state court. During the last term, the Court held that a petitioner can be excused from procedural default if the claim asserted was "novel" at the time of his conviction. *Reed* v. *Ross,* 468 U.S. —, 104 S.Ct. 2901 (1984). More recently, this Court granted certiorari on the issue of whether *Wainwright* "cause" determinations must first be sought in state courts. *Alcorn* v. *Smith,* 724 F.2d 37 (6th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3617 (U.S. February 25, 1985) (No. 84-5636) (see discussion, page 11-12 of this Petition).

III.

The Ruling Below that WAINWRIGHT "Cause" Claims Need Not be Exhausted Involves an Important Question of Federal Law.

In the case at bar, the Fourth Circuit also held that the "exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." (Pet. App. 14).

This holding is in direct conflict with the decision of the Sixth Circuit in *Alcorn* v. *Smith,* 724 F.2d 37 (6th Cir. 1983), *cert. granted,* 53 U.S.L.W. 3617 (U.S. February 25, 1985) (No. 84-5636). This Court recently granted certiorari in *Alcorn,* to review the identical question of whether federal habeas corpus petitioners are required to exhaust *Wainwright* "cause" claims, in addition to independent claims, in state courts. Since the Court will be reviewing the issue in *Alcorn,* and since the *Alcorn* petition for certiorari emphasized the direct conflict with the Fourth Circuit's decision in *Carrier,* certiorari should be granted, and the cases consolidated for review.

This Court has held that a federal court cannot consider a habeas petition unless the petitioner has "fairly presented" the "substance" of his federal claim to the state courts. *Anderson* v. *Harless,* 459 U.S. 4 (1982). This exhaustion doctrine requires a habeas applicant to exhaust "the question presented" in his federal petition "by any available procedure" in state courts. 28 U.S.C. § 2254(c). The precise issue involved here, exhaustion of the "cause" claim, has not been addressed by this Court, or any circuit courts other than the Sixth and Fourth Circuits. However, in *Rose* v. *Lundy,* 455 U.S. 509, 522 (1982), this Court held that a habeas petition must be dismissed if it contains *any* claims that have not been exhausted in the state courts. *Rose*

emphasizes the importance of reducing piecemeal litigation, by mandating review of all claims in a single proceeding. 455 U.S. at 520.

Here, petitioner's claims before the Court of Appeals concerning attorney error were never presented to, or considered by, the Virginia courts. Yet the Fourth Circuit has directed the District Court to determine the basis for appellate counsel's actions, even though applicability of the *Wainwright* doctrine may turn on interpretations of state law. *See Jenkins* v. *Anderson,* 447 U.S. 231, 234 n.1 (1980). As the Sixth Circuit noted in *Alcorn,* considerations of comity and federalism require that state courts be given the opportunity to decide "whether the circumstances . . . warrant excuse of procedural rules." 724 F.2d 37, 40. The decision in the instant case is not only inconsistent with *Alcorn,* but also with the principles of comity underlying *Rose* v. *Lundy,* 455 U.S. at 520-22, and *Anderson* v. *Harless,* 459 U.S. at 5. Review of this important exhaustion issue is therefore warranted.

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit in this case conflicts with decisions in other courts of appeals, contravenes the decisions of this Court and undermines the principles of federalism and comity. For the reasons stated herein, petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-6039

CLIFFORD W. CARRIER,

Appellant,

v.

TERRELL D. HUTTO, Director
of the Virginia Department of Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (C/A 80-1041-N)

Argued: June 4, 1984 Decided: February 7, 1985

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting *En Banc.*

William A. Reppy for appellant; Linwood T. Wells, Assistant Attorney General, (Gerald L. Baliles, Attorney General of Virginia, on brief) for appellee.

PER CURIAM:

Being of the opinion that under some circumstances, an error by an attorney which does not constitute a violation of the sixth amendment might be "cause" within the meaning of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), we reverse the decision of the district court and remand this proceeding to that court for a determination of whether Carrier can successfully meet the "cause" requirement of *Wainwright*, and if so, whether he can then satisfy the "prejudice" prong of the *Wainwright* exception to procedural bar. The basis for our ruling is adequately set forth in the panel majority opinion and need not be repeated here. *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983).

Judge Russell, Judge Widener, Judge Hall, and Judge Chapman dissent, believing that the district court should be affirmed because of Carrier's failure to exhaust his state remedies and his failure to satisfy the cause and prejudice requirements of *Wainwright* as articulated by Judge Hall in his dissenting opinion, 724 F.2d at 403.

App. 3

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-6039

CLIFFORD W. CARRIER,

Appellant,

v.

TERRELL D. HUTTO, Director
of the Virginia Department of Corrections,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (C/A 80-1041-N)

Argued: May 12, 1984 Decided: December 27, 1983

Before HALL and ERVIN, Circuit Judges, and WYZANSKI,* Senior District Judge.

Karen L. Morris, Third Year Law Student (William A. Reppy, Jr., Duke Law School on brief) for Appellant; Linwood T. Wells, Jr., Assistant Attorney General (Gerald L. Baliles, Attorney General of Virginia on brief) for Appellee.

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* Honorable Charles E. Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation.

ERVIN, Circuit Judge:

Clifford Carrier, a Virginia prisoner, appeals from the dismissal of his federal petition for a writ of habeas corpus under 28 U.S.C. § 2254. His petition alleged that the state trial court violated due process by denying Carrier access to certain evidence in the district attorney's possession. The district court ruled that because Carrier failed to present this claim on direct appeal to the Virginia Supreme Court, he was barred from doing so in federal court absent a showing of cause and prejudice. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Carrier asserted as *Wainwright* "cause" that the failure to take a state appeal was wholly the product of attorney error, to which the district court replied that because Carrier had not pressed a claim of ineffective assistance of counsel in state proceedings he had failed to meet the prerequisite for federal habeas relief of exhausting his state remedies. *See* 28 U.S.C. § 2254(b) and (c). The court added that since Virginia recognized a "cause" exception to its rule barring state collateral relief where issues were not raised on direct appeal, Virginia should be given the first opportunity to decide whether Carrier had good cause for neglecting direct appeal.

We reverse and hold that under certain circumstances attorney error which is insufficient to make out a violation of the sixth amendment may nevertheless constitute "cause" under the *Wainwright* exception to procedural bar. We remand so that the district court may decide whether Carrier's articulation of attorney error satisfies the requirements set forth herein and whether Carrier has met the prejudice prong of the *Wainwright* exception.

I.

Clifford Carrier was tried and convicted of rape and

abduction in Virginia. Prior to trial, Carrier's court-appointed counsel moved to discover all statements by the victim to police that specifically contained descriptions of her assailants, the assailants' vehicle, and the location of the alleged rape. The Commonwealth responded that such statements would be furnished to the trial judge for *in camera* inspection, and that the judge would decide which statements to give over to defense counsel. Upon examination the judge notified defense counsel that the statements bore "no evidence of an exculpatory nature." Immediately before trial, defense counsel moved the court to transmit copies of any statements made to police by the victim and by an identification witness. The court responded with another *in camera* inspection and then informed counsel that because the statements contained no exculpatory evidence, they would not be released. The judge then sealed the statements. Defense counsel formally excepted "for purposes of the record." After Carrier was convicted, counsel filed notice of appeal assigning seven errors, including the following:

> **5. Did the trial judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial and during the course of the trial?**

Counsel subsequently filed an appellate brief urging five grounds for reversal but inexplicably abandoning the claim that the court's denial of discovery violated due process. The Virginia Supreme Court refused to review Carrier's appeal, after which he filed, pro se, a state habeas corpus petition alleging that the withholding of the victim's statements to police describing her assailants was a denial of due process under the fourteenth amendment. The state moved to dismiss because of failure to pursue this contention on direct appeal. *See* Va. S. Ct. Rule 5:21; *Slayton*

v. *Parrigan*, 205 S.E.2d 680, 682 (Va. 1974), *cert. denied, sub. nom., Parrigan* v. *Paderick,* 419 U.S. 1108 (1975). The motion was granted and the Virginia Supreme Court denied certiorari.

Carrier then filed pro se a petition for a writ of habeas corpus in the federal district court for the Eastern District of Virginia, asserting as grounds for relief the denial of due process. The state moved to dismiss, claiming that failure to raise the due process issue on direct appeal was a bar to collateral attack in federal court. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Anticipating that in amended pleadings Carrier might assert attorney error as the cause for omitting state appeal, the state also contended that Carrier had failed to exhaust state remedies with regard to ineffectiveness of counsel, arguing that in state court he could "allege ineffective assistance of counsel for failure . . . to raise the issue . . . on appeal."

In district court, the matter was referred to a magistrate, who recommended dismissal of the petition because of procedural default under *Wainwright*. The magistrate also suggested that Carrier had not exhausted state remedies and that the Virginia courts would still entertain a habeas petition to examine the due process question if petitioner would allege ineffectiveness of counsel as "cause" for the procedural default.

Carrier then filed a "Motion of Objection and Exception" to the magistrate's report. He argued that the failure to raise his due process claim on direct appeal "was not due to any fault of his" but was the result of "eneffective [sic] assistance of counsel."

The district court was unswayed by Carrier's motion and adopted the magistrate's recommendation, dismissing the petition. In a footnote to its opinion, the court said that the

exhaustion requirement of 28 U.S.C. § 2254 barred Carrier from asserting a claim of ineffective assistance of counsel, since Carrier had not raised that allegation in state proceedings. The court remarked that dismissal of the federal habeas claim due to failure to exhaust state remedies is "not necessarily a dismissal with prejudice," and that Carrier might well be able to establish "cause" for failing to appeal the error, but should do so in the first instance in a habeas proceeding in the Virginia courts.

II.

The crux of Carrier's federal habeas petition is that he was denied due process of law under the fourteenth amendment when the state trial court refused defense counsel's specific request for the victim's statements to police on the ground that those statements contained "no evidence of an exculpatory nature." Citing *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *United States* v. *Agurs,* 427 U.S. 97, 106 (1976), Carrier urges that the standard which should have been employed by the court in delimiting discovery was whether the evidence specifically requested was "material . . . to guilt," *Brady,* 373 U.S. at 87, not whether it was exculpatory. *See also Chavis* v. *North Carolina,* 637 F.2d 213, 223 (4th Cir. 1980).

Although Carrier's lawyer lodged this *Brady* objection at trial, he did not appeal it. Under Virginia law, this meant that the issue was lost for purposes of direct and collateral review.[1] What is more, in the face of a state

[1] Va. S. Ct. R. 5:21 states in pertinent part:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. *Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below.* (emphasis added)

contemporaneous objection rule, the failure to prosecute a constitutional claim to the state's highest court on direct appeal brings into play the case of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977). In *Wainwright,* the Supreme Court held that in the presence of an adequate and independent state procedural ground for decision, federal review of constitutional claims would be barred on habeas, as on direct appeal, absent a showing of cause for noncompliance with the state procedural rule and also a showing of actual prejudice resulting from the alleged constitutional violation.[2] The Court left open the question of what might be sufficient "cause" to excuse procedural default, and the precise issue to be resolved in this case is whether Carrier's assertion of "ineffective assistance of counsel" can make out *Wainwright* "cause." The district court held it could not, construing Carrier's contention as a claim under the sixth amendment for habeas relief which could not be entertained by the federal courts until state remedies had been exhausted. *See* 28 U.S.C. § 2254. Since Carrier had advanced only his *Brady* claim before the state habeas court, the district court dismissed his habeas petition without prejudice pending the exhaustion of state remedies with regard to the claim of ineffective assistance of counsel. *See Rose* v. *Lundy,* 455 U.S. 509 (1982). The court opined that Carrier might "well be able to establish 'cause' for his default, but should do so in the first instance in the Virginia courts."

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[2] The *Wainwright* doctrine specifically dealt with violations of a state contemporaneous objection rule. In *Cole* v. *Stevenson,* 620 F.2d 1055 (4th Cir. 1980) (en banc), *cert denied,* 449 U.S. 1004 (1980), the *Wainwright* bar to federal review was applied where the state rule foreclosed consideration of issues not raised on appeal, as in the present case.

We view Carrier's arguments below differently from the district court. Specifically, we discern no claim by Carrier that he was deprived of his constitutional right to effective representation by counsel during the course of his trial.[3] At oral argument before this court, Carrier's newly-appointed appellate counsel expressly disavowed any contention that trial counsel failed the sixth amendment standard. Indeed, with the exception of the unexplained failure to appeal the *Brady* issue, Carrier's trial lawyer appears to have performed with diligence and skill.

We thus arrive at the nub of the case: Can a single act or omission by counsel, insufficient by itself to contravene the sixth amendment, satisfy the "cause" prong of the exception to preclusive procedural default discussed in *Wainwright*?

Several cases provide helpful guidance to our inquiry. We start with the familiar proposition that a deliberate tactical decision by counsel not to object or appeal a constitutional claim can almost never furnish cause,[4] since matters of trial and appellate tactics are entrusted to the judgment of the lawyer,[5] who acts as the defendant's champion. *See Henry* v. *Mississippi,* 379 U.S. 443, 451 (1965); *Fay* v. *Noia,* 372 U.S. 391, 439 (1963); *Satterfield* v. *Zahradnick,* 572 F.2d 443, 446 (4th Cir. 1978), *cert. denied,* 436 U.S. 920

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[3] In this circuit, the test for weighing the effectiveness of counsel is whether "counsel's representation [was] within the range of competence demanded of attorneys in criminal cases." *Marzullo* v. *Maryland,* 561 F.2d 540, 543 (4th Cir. 1977).

Although Carrier's own pleadings in the district court refer to "eneffective [sic] assistance of counsel," the obvious thrust of his argument below was that a single oversight by his otherwise competent lawyer brought Carrier to this procedural impasse.

[4] *But see Wainwright* v. *Sykes,* 433 U.S. at 94 n.1 (1977) (Stevens, J., concurring).

[5] *Id.* at 95 n.2.

(1978). *See also Fowler* v. *Parratt,* 682 F.2d 746, 751 (8th Cir. 1982); *Goldman* v. *Anderson,* 625 F.2d 135, 138 (6th Cir. 1980).

Next we come to cases in which counsel's actions may reflect not deliberate calculation, but ignorance or oversight. In *Runnels* v. *Hess,* 653 F.2d 1359, 1364 (10th Cir. 1981), the Tenth Circuit held that in some instances ineffective assistance short of that necessary to make out a sixth amendment claim could supply *Wainwright* cause. The court distinguished between deliberate "sandbagging" by counsel (*i.e.,* for purposes of appeal, withholding constitutional claims at trial in hopes of a favorable verdict) versus erroneous, nontactical decisions resulting in prejudice. The court remanded for the district judge to determine whether the failure to object resulted from a tactical decision. *Accord, Jiminez* v. *Estelle,* 557 F.2d 506, 510-11 (5th Cir. 1977).[6] *See also Collins* v. *Augur,* 577 F.2d 1107, 1110 n.2 (8th Cir. 1978) (dictum), *cert. denied,* 439 U.S. 1133 (1979) (lack of knowledge of facts or law by counsel would be sufficient cause for failure to make objection within the "cause and prejudice" test of *Francis* v. *Henderson,* 425 U.S. 536 (1976), the precursor of *Wainwright* v. *Sykes,* 433 U.S. 72 (1977)); *Rachel* v. *Bordenkircher,* 590 F.2d 200, 204 (6th Cir. 1978) (cause found where affidavits by defense counsel showed inexperience, inattention and lack of knowledge of applicable law); *Sincox* v. *United States,* 571 F.2d 876, 879-80 (5th Cir. 1978) (counsel's failure to object when polled juror admitted doubt over guilty verdict constituted both *Wain-*

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[6] *Cf. Washington* v. *Estelle,* 648 F.2d 276, 278 (5th Cir. 1981), *cert. denied,* 454 U.S. 899 (1981) (mere allegation of ineffective assistance of counsel does not suffice to make out "cause" for non-objection). *Accord, Sullivan* v. *Wainwright,* 695 F.2d 1306 (11th Cir. 1983).

wright cause and ineffective assistance of counsel). *Cf. Dumont* v. *Estelle,* 513 F.2d 793, 798 (5th Cir. 1975) (unencouraging status of the law does not of itself excuse nonobjection).

The Ninth Circuit took a slightly different approach in *Garrison* v. *McCarthy,* 653 F.2d 374 (9th Cir. 1981), holding that where a deliberate tactical decision resulted in procedural default, the defendant had to show that counsel's action amounted to a sixth amendment violation in order to overcome the *Wainwright* bar. On the other hand, where the failure to object or appeal was merely due to "inadvertence or ignorance, a lesser showing of incompetency should be sufficient for 'cause.'" *Id.* at 378. The court went on to find that the petitioner's constitutional claim was barred because there was strong indication in the record that the nonobjection was a reasonable tactical decision, and little evidence of inadvertence.

Finally, the Fifth Circuit has pointed out the irrationality of equating *Wainwright* "cause" with sixth amendment ineffective assistance of counsel, as the district court did in this case:

> Of course, [attorney] misfeasance need not amount to a denial of the defendant's constitutional right to counsel; if it did it would be an independently sufficient reason to grant relief and would make it immaterial whether other constitutional claims had been forfeited.

Jurek v. *Estelle,* 593 F.2d 672, 683 n.19 (5th Cir. 1979), *vacated on other grounds,* 623 F.2d 929 (1980), *cert. denied,* 450 U.S. 1001 (1981).

From these authorities—which the Commonwealth does not challenge on this appeal—we conclude that attorney error short of wholesale ineffectiveness of counsel can con-

stitute *Wainwright* cause, provided that the act or omission resulting in procedurai default emanated from ignorance or inadvertence, rather than deliberate strategy. Since counsel is entrusted with decisions of trial and appellate strategy, as opposed to decisions affecting the exercise of fundamental rights (*e.g.*, what issues to appeal versus whether to appeal at all), the calculated avoidance of state channels for raising specific issues in hopes of a favorable judgment cannot furnish cause, albeit the strategy failed, unless the errant decision not to object falls outside the range of ordinary attorney competence and therefore violates the sixth amendment. *Marzullo* v. *Maryland, supra,* 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011 (1978); *Garrison* v. *McCarthy, supra,* 653 F.2d 374, 378 (9th Cir. 1981). Procedural default is excused not when counsel reasonably but incorrectly exercises her judgment, but when, through ignorance or oversight, she fails to exercise it at all, in dereliction of the duty to represent her client. This is what we mean by attorney error, and in such a case, the defendant should not be penalized under *Wainwright* for a momentary lapse by counsel.

On presenting a constitutional claim which was not preserved in the state tribunal, the federal habeas petitioner has the burden of showing to the district court that the failure to object or to appeal his claim was the product of his attorney's ignorance or oversight, not a deliberate tactic. If the nonobjection was deliberate, the petitioner must show that counsel's particular decision amounted to a breach of the sixth amendment in order to overcome the *Wainwright* bar. Beyond this showing, the petitioner need not prove that counsel's overall representation fell outside "the range of competence demanded of attorneys in criminal cases." *Marzullo* v. *Maryland,* 561 F.2d 540, 543 (4th Cir. 1977).

Our decision is consistent with *Honeycutt* v. *Mahoney*, 698 F.2d 213 (4th Cir. 1983), in which this court considered whether certain claims of ineffective assistance of counsel satisfied the "cause" prong of the *Wainwright* exception, as applied in *Cole* v. *Stevenson*, 620 F.2d 1055 (4th Cir. 1980)(en banc), *cert. denied*, 449 U.S. 1004 (1980). The petitioner, Billy Honeycutt, had been convicted of murder in North Carolina. In his federal habeas petition, he alleged that the state trial court erred in failing to instruct the jury on self-defense and in assigning Honeycutt the burden of disproving malice. *See Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). Neither of these objections was preserved at trial or on appeal and were therefore forfeited under North Carolina procedural law. *See Honeycutt* at 215 n.1. Honeycutt asked that the *Wainwright* bar to federal review be lifted, asserting ineffectiveness of counsel as cause for the failure to object and appeal. Significantly, we did not dismiss the case for failure to exhaust state remedies with respect to any sixth amendment claim. Instead, the court looked closely at the facts and concluded that in each instance, counsel's nonobjection did not constitute ineffective assistance of counsel and that therefore Honeycutt did not make out cause. The court was not presented with any evidence that counsel's failure to object resulted from ignorance or inadvertence, rather than deliberate judgment on the part of counsel.[7]

[7] Our decision also aligns with *Crowell* v. *Zahradnick*, 571 F.2d 1257 (4th Cir. 1977), *cert. denied*, 439 U.S. 956 (1978), in which this court dismissed an unexhausted claim for habeas relief. As an alternative ground for decision, the court noted that the petitioner had not preserved his claim in state proceedings and had not offered any cause for failing to do so. *Id.* at 1258 n.1. Here, on the other hand, Carrier's explanation for his procedural fault is forthrightly presented. Assuming his attorney acted out of ignorance or inadvertence—which remains for the district court to determine—Carrier has met the *Wainwright* cause requirement.

We believe the district court erred in remarking that the "petitioner may well be able to establish 'cause' for his default but should do so in the first instance in the Virginia courts." The exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice. Of course, if the habeas petitioner asserts both attorney error as "cause" and a fresh claim of ineffective assistance as a ground for habeas relief, he may overcome the *Wainwright* bar, but he will be remanded without prejudice to the state courts for adjudication of his unexhausted sixth amendment claim. *See Rose* v. *Lundy*, 455 U.S. 509 (1982) (under 28 U.S.C. § 2254, a petition for habeas corpus containing both exhausted and unexhausted constitutional claims must be dismissed). However, this case presents no such claim of ineffectiveness as an independent ground for habeas relief and thus does not involve exhaustion questions at all; only the issue of what constitutes *Wainwright* cause is present here. Certainly neither justice nor judicial economy is served by mislabelling Carrier's proffer of cause as a claim of ineffective assistance which, as an independent, unexhausted ground for habeas relief, must be remanded to the state forum for further proceedings.[8]

III.

We remand the case to the district court for two reasons. First, although the likelihood of attorney error appears

[8] Furthermore, since this is not an exhaustion of remedies case, we need not inquire whether any state remedies in fact remain available to Carrier or whether further state proceedings would be futile due to the operation of Virginia law. *See Engle* v. *Isaac*, 456 U.S. 107, 125 n.28 (1982); *Crowell* v. *Zahradnick*, 571 F.2d 1257, 1259 n.2 (4th Cir. 1977), *cert. denied*, 439 U.S. 956 (1978); *Slayton* v. *Parrigan*, 205 S. E. 2d 680, 682 (Va. 1974), *cert. denied, sub nom., Parrigan* v. *Paderick*, 419 U.S. 1108 (1975); Va. S. Ct. R. 5:21, note 1 *supra*.

very great in this case, we lack testimony from Carrier's counsel which might disclose a strategic reason for failing to appeal the *Brady* issue. The question of counsel's motivation is one of fact for the district court to resolve upon taking further evidence. *See Runnels* v. *Hess,* 653 F.2d 1359, 1364 (10th Cir. 1981). Carrier may not be faulted for the present dearth of evidence, since he was unaware of its need until the eleventh hour in the district court proceedings.

Second, assuming Carrier proves attorney error as the cause for failing to appeal his *Brady* claim, the district court must still determine under the second prong of the *Wainwright* exception whether, in light of all the evidence, Carrier was prejudiced by the alleged constitutional error.

IV.

We hold that an act or omission by counsel which evinces ignorance or oversight may constitute attorney error sufficient to satisfy the "cause" prong of the *Wainwright* exception. Deliberate nonobjection does not make out cause unless the decision amounts to ineffective assistance of counsel, which Carrier no longer contends in his case. We remand for the district court to determine whether counsel's failure to appeal the *Brady* issue was in fact attorney error or whether it was simply unsuccessful appellate strategy. The district court must also decide under *Wainwright* whether the withholding of evidence, if indeed a constitutional violation, prejudiced Carrier at trial. Accordingly, the judgment of the district court is reversed and the cause remanded for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.[9]

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[9] To the extent that our opinion is inconsistent with *Washington* v. *Downes,* 475 F. Supp. 573 (E.D. Va. 1975), that case is overruled.

HALL, Circuit Judge, dissenting:

Flim-flam is too harsh a term, so I will instead say that defense counsel has persuaded the majority to consider on appeal a case entirely different from the one below. What was once an issue under *Jencks* v. *United States,*[1] defense counsel has now turned into an issue under *Brady* v. *Maryland.*[2] In addition, I do not agree with the majority that this case may fall under the "cause and prejudice" exception to the rule promulgated in *Sykes* v. *Wainwright,*[3] nor do I agree that exhaustion of state remedies is inappropriate in this case. I therefore dissent.

I.

By indicating that petitioner may find protection under *Wainwright*, the majority refuses to take into consideration both the factual background to petitioner's underlying claim and the issue of exhaustion of state remedies. Petitioner's central claim is that the state trial judge improperly stifled discovery by applying the "exculpatory" test outlined in *United States* v. *Agurs,* 427 U.S. 97, 106 (1976), instead of the appropriate "materiality" test promulgated in *Brady* v. *Maryland,* 373 U.S. at 83,[4] when he denied petitioner's request for the original statements of government

[1] 353 U.S. 657 (1957).

[2] 373 U.S. 83 (1963).

[3] 433 U.S. 72 (1977).

[4] The *Brady* and *Agurs* tests are used to control discovery procedures. In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment. . . ." 373 U.S. 87; *see also Chavis* v. *State of North Carolina,* 637 F.2d 213, 222 (4th Cir. 1980). Pursuant to this standard, when a defendant makes a request to discover specific documents, he must be given these documents if they are "favorable" and "material to guilt." The *Brady* rule was refined and expanded in *Agurs;* where the Court held that the less rigorous "exculpatory" test was appropriate when a defendant makes an open-ended non-

witnesses describing the assailants. Petitioner claims that he objected to this error at the time it occurred. Even the most cursory glance at the record, however, reveals a different story.

Nowhere in the record is there any reference to *Agurs* or *Brady* discovery tests. Instead, the record reveals that petitioner sought statements under *Jencks* v. *United States,* 353 U.S. at 657, for the purpose of cross-examination,[5] and that when his request was denied he objected solely on the basis of *Jencks.*[6] Petitioner did not object to the judge's use of an exculpatory test. Not only is the trial record devoid of a single *Brady* argument or objection, but even *after* the trial petitioner never mentioned *Brady* in his state habeas corpus petitions or his habeas petition to the federal district court.

Thus, even if there is a *Brady* issue in this case, it was never raised at the trial court level or on direct appeal.[7]

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specific request for material. 427 U.S. at 106. *See also Chavis,* 637 F.2d at 223. Pursuant to *Agurs,* the conclusion that due process was denied follows only if petitioner can show that the undisclosed evidence "might have affected the outcome of the trial." 427 U.S. at 105. In evaluating the trend among other circuits attempting to follow *Agurs,* this Court has concluded that "a new trial is required if there was a 'reasonable possibility' that the undisclosed evidence would have materially affected the verdict." *Chavis,* 637 F.2d at 223.

[5] Trial tr. at 4.

[6] "MR. BURNSIDE: [T]hen for the purposes of the record, the defendant would except to that ruling again on the basis of *Jencks* v. *United States,* stating that the defendant should have the opportunity to actually reviewing [sic] those statements." Trial tr. at 151-52.

[7] It is highly unlikely that a valid *Brady* claim can be drawn from this case. Even if the Court were to ignore the references to *Jencks* and to read *Brady* into the trial transcript, petitioner has not prevailed upon the threshold issue of whether his request was specific enough to fall within the *Brady* rule. Even more importantly, he has made no showing that the suppressed material might have affected the outcome of the trial. *See Agurs,* 427 U.S. at 105, Dozier v. Commonwealth, 221 Va. 1113, 253 S.E.2d 655 (1979); *supra* note 4. The record in this case indicates that the state trial judge reviewed the statements and found them not to be exculpatory. Thus petitioner's

Petitioner's request that this Court now review the issue flies directly in the face of the *Wainwright* doctrine. In *Picard* v. *Connor,* 404 U.S. 270, 275-76 (1971), the Supreme Court emphasized that a petitioner may bring a federal habeas proceeding only if state courts have first had the opportunity to hear that claim. This holding was reaffirmed recently in *Rose* v. *Lundy,* 455 U.S. 509 (1982). *See also Cole* v. *Stevenson,* 620 F.2d 1055 (1980) (where this Court refused to hear petitioner's due process claim because he had neither objected at trial nor appealed the issue, thereby denying the state an opportunity to rule on it). In my view, these cases are controlling and this Court must dismiss the instant case for failure to exhaust state remedies.

II.

The majority suggests that petitioner may ultimately prevail under the "cause and prejudice" exception to *Wainwright* and that this case must therefore be remanded to the district court for an evidentiary hearing. I disagree. Assuming *arguendo* that petitioner could show cause under *Wainwright*, such a showing would merely underscore his failure to pursue Virginia state court remedies.

Under *Wainwright*, federal courts may not, absent a showing of cause and prejudice, take cognizance of constitutional issues in habeas corpus petitions by state prisoners which could have been, but which were not, raised before the state trial court when state procedural law requires that

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argument—that he was subjected to an actual and substantial disadvantage infecting his entire trial because his appellate counsel failed to raise the *Brady* issue—is purely speculative. If an appellant could overturn any judicial denial of information with the unsupported assertion that the information might have changed the outcome of the trial, rules protecting nondisclosure would become farcical.

such matters be raised at trial to be considered on direct appeal. 433 U.S. 72 (1977). *See also Frazier* v. *Weatherholtz,* 572 F.2d 994 (4th Cir. 1978).

Although the Supreme Court did not define cause and prejudice, it suggested that actual prejudice in this context is tantamount to constitutional error which is not harmless beyond a reasonable doubt. 433 U.S. at 97-98 (White, J., concurring) and at 117 (Brennan, J., dissenting). More recently, the Supreme Court held that to fall within the *Wainwright* exception relating to prejudice there must be actual, not possible, prejudice resulting in "actual and substantial disadvantage, infecting [the] entire trial with error of constitutional dimensions." *United States* v. *Frady,* 456 U.S. 152 (1982). In the instant case, petitioner fails to make any showing of an actual, much less substantial, disadvantage from his appellate counsel's failure to argue the alleged *Brady* issue on direct appeal. Instead, petitioner boldly asserts that he lost a "sure thing" reversal. This conclusory statement in no way fulfills the requirement of showing actual prejudice, and since petitioner does not present any evidence to substantiate his assertion, I can see no reason to remand this issue for an evidentiary hearing.

Similarly, petitioner claims that his appellate counsel's failure to argue the *Brady* issue on appeal also satisfies the "cause" prong of the exception to *Wainwright.* Appellant offers no evidence, however, to dispute the great likelihood that this was a tactical decision. Petitioner's appellate counsel originally included petitioner's present complaint in his notice of appeal, then subsequently decided not to brief it. In my view, this decision was both tactical and wise, as counsel undoubtedly recognized it as a weak issue. As the Supreme Court recently observed in *Engle* v. *Issac,* 456 U.S. 107 (1982): "Every trial presents a myriad of possible

claims. Counsel might have overlooked or chosen to omit [a certain] argument while pursuing other avenues of defense. . . . [The Constitution] does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Id.* at 133-34.

I believe that the majority misreads *Wainwright* in concluding that such speculative attorney error—error which at worst falls far short of ineffective assistance of counsel—constitutes *Wainwright* cause. Such an extension of the cause standard emasculates the contemporaneous objection rule entirely. Under the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under *Wainwright*), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the *Wainwright* bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule.

III.

At the time of petitioner's trial, Virginia had in effect a contemporaneous objection rule applicable both to trials and to appeal petitions. Rule 5:21, Rules of the Supreme Court of Virginia (1983).[8] The Virginia Supreme Court had also specifically held that state habeas corpus could not be used to raise issues, including federal constitutional issues, which could have been but were not raised at trial

[8] Rule 5:21 of the Rules of the Supreme Court of Virginia provides in part:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below.

and on direct appeal. *Slayton* v. *Parrigan,* 215 Va. 27, 29-30, 205 S.E.2d 680, 682 (1974), *cert. denied, sub nom. Parrigan* v. *Paderick,* 419 U.S. 1108 (1975). *See Crowell* v. *Zahradnick,* 571 F.2d 1257, 1258 n.1, 1259 n.2 (4th Cir. 1977).

Virginia procedure, however, accommodates excuses for failure to comply with the requirement that allegations of trial court error be specifically noted on appeal when there is justifiable cause for the procedural default. Even if errors were not made the subject of a timely direct appeal, the Virginia Supreme Court will, in some circumstances, permit a delayed appeal. *See Miller* v. *Commonwealth,* 217 Va. 929, 930, 234 S.E.2d 269 (1977). Furthermore, and of critical importance to this case, if there was good cause for a criminal defendant's failure to raise trial error on direct appeal, it can be addressed in a state habeas corpus proceeding notwithstanding the usual rule that state habeas is available only to attack detention on grounds which could not have been raised at trial or on direct appeal. *Slayton* v. *Parrigan*, 215 Va. at 27, 205 S.E.2d at 680.

Here, the alleged error was counsel's failure to argue *Brady* on direct appeal. Because this error occurred during the appellate process, and the state courts had no opportunity to rule on it, petitioner should have subsequently brought a habeas corpus petition, alleging ineffective assistance of counsel, in the state trial court.

In *Washington* v. *Downes,* 475 F.Supp. 573, 577 (E.D. Va. 1979), the Federal District Court for the Eastern District of Virginia specifically stipulated that a petitioner could not bypass Virginia state remedies by making a challenge under the cause exception to *Wainwright. See also Richardson* v. *Turner,* No. 83-6194, __F.2d__ (4th Cir. Sept. 9, 1983) (indicating state courts should be allowed to apply their

own "good cause" rules before federal courts can rule on a petition); *Crowell* v. *Zahradnick,* 571 F.2d at 1258 n.1, 1259 n.2; 28 U.S.C. Sec. 2254(b) and (c).[9] The Supreme Court provided strong support for *Downes* and *Richardson* in *Rose* v. *Lundy,* 455 U.S. 509 (1982), and *Picard* v. *Connor,* 404 U.S. 270 (1971), by holding that a petitioner may bring a federal habeas proceeding only after state courts have had an opportunity to hear that claim. Consequently, even if petitioner could prove cause and prejudice under the *Wainwright* exception, the case still must be dismissed for failure to exhaust state remedies.

Petitioner's contention that exhaustion would only be an exercise in futility, is clearly meritless in light of the more important considerations of comity, federalism, and the orderly administration of criminal justice.[10]

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[9] Title 28 U.S.C. Sec. 2254(b) and (c) provide:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to [sic] granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise *by any available procedure,* the question presented. (emphasis added).

[10] In Hoffman v. Persue, 420 U.S. 592 (1975) the Supreme Court stated: "[T]he considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious." *Id.* at 610. *See also Engle* v. *Isaac,* 456 U.S. 107, 130 (1982).

B. Trial Counsel's Error Was So Inexcusable As To Meet Both The Sixth Amendment Standard For Ineffective Counsel And Any Lower Test Utilized Under Wainwright v. Sykes.

Petitioner's original application for writ of habeas corpus filed in federal district court goes directly to the merits of his *Brady* claim and contains no suggestion of "cause" for failure to pursue it on appeal before the Supreme Court of Virginia. It is apparent from the entire record that petitioner, making his collateral attack without assistance of counsel, simply did not understand the "cause" issue until receiving the lucid and lengthy Magistrate's Report and Recommendation. App. 76-88. Petitioner then filed a document entitled "Motion of Objection and Exception," asserting that the failure to appeal the issue concerning discovery "was not due to any fault of his . . . [but] was the results of eneffective [sic] assistance of counsel." App. 84. The document further asserted that petitioner was not permitted by defense counsel to fully take part in preparation of the appeal and was unable to review the brief before it was filed with the Supreme Court of Virginia. The document states that petitioner alleges these facts as "cause" under *Wainwright* v. *Sykes,* citing some of the "cause" cases discussed below. App. 84.

Pro se filings should be liberally construed. See *Haines* v. *Kerner,* 404 U.S. 519 (1972); *Frazier* v. *Paderick,* 383 F. Supp. 826 (W.D. Va. 1974). Petitioner's "Motion of Objection and Exception" should be viewed as an amendment to his application for writ of habeas corpus asserting "cause" under *Wainwright* v. *Sykes.* At the very least the trial court was required to invite petitioner to move to amend his application for writ of habeas corpus to include in it the contentions of attorney error as "cause" under *Wainwright* v. *Sykes* made by petitioner in his "Motion of Objection

and Exception" (App. 83-85). See Johnson v. Copinger, 420 F.2d 395, 397 (4th Cir. 1969).

Wainwright v. *Sykes, supra,* indicates that some kinds of attorney error will constitute the "cause" that enable a federal habeas corpus court to reach the merits of a constitutional claim despite a procedural default that precludes relief in state court. The Supreme Court observed that a failure to pursue the objection would not be cause if it was the result of "trial strategy," 433 U.S. at 91 n. 14, such as "sandbagging," *id.* at 89 (*e.g.,* hoping for a favorable verdict with improper evidence before the jury with the notion a reversal could be obtained if the jury convicted). The *Wainwright* opinion indicates that the lower courts should determine precisely what kind of attorney error would constitute such "cause."

Unquestionably such a failure as would independently—without other constitutional error—entitle a prisoner to release on habeas corpus as equivalent to denial of counsel under Sixth Amendment (or the Fourteenth Amendment as it incorporates Sixth Amendment standards) will constitute "cause" under *Wainwright*. The Sixth Amendment standard requires that "all decisions materially affecting the defendant's representation be the product of informed judgment, not neglect or ignorance." Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (indicating that under this test trial counsel should make all nonfrivolous objections to admission of incriminating evidence). Accord, Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977).

Defense counsel's failure to brief the preserved error of denial of discovery could not have been tactical. The trial was over, and nothing could be gained by dropping the claim he had so hotly contested throughout the trial. Counsel's failure can only have been the result of his ignorance

of *United States* v. *Agurs, supra,* since even a causal [sic] reading of *Agurs* makes immmediately clear that the exculpatory test employed by the trial court is inappropriate when the discovery request specifically identifies the material desired by the defense. *Agurs* implements and explains *Brady,* a decision under the Fourteenth Amendment due process clause binding on the state of Virginia. Thus, attorney error of Sixth Amendment magnitude appears.[1]

[1] If this court has any doubt about the nature of the attorney error, the district court's order of dismissal should not be affirmed. Rather, a remand would be appropriate for the purposes of obtaining evidence (such as affidavits from the trial attorney) concerning the reason for the inexplicable agandonment [sic] on appeal of the clear claim or reversible error. See *Johnson* v. *Copinger,* 420 F.2d 395, 400 (4th Cir. 1969) (remand on "cause" issue to enable such evidence to be obtained).

In The

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CLIFFORD W. CARRIER,
Petitioner(s),

vs.

TERRELL D. HUTTO,
Director of the Virginia Department of Corrections,
Respondent(s).

CIVIL ACTION
No. 80-1041-N

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision having been duly rendered,

It is ADJUDGED and ORDERED that this action be dismissed.

W. FARLEY POWERS, JR.,
Clerk
ANN F. RIVES,
Deputy Clerk

Date: October 18, 1982

In The

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

CLIFFORD W. CARRIER, # 112229,
Petitioner,

v.

TERRELL D. HUTTO,
Director of the Virginia Department of Corrections,
Respondent.

CIVIL ACTION
No. 80-1041-N

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. Sec. 2254.

The petition alleges violation of federal rights pertaining to petitioner's convictions on March 28, 1977 in the Circuit Court of the City of Virginia Beach, for rape and abduction, as a result of which he was sentenced to serve 45 years in the Virginia penal system.

The matter was referred to a United States Magistrate pursuant to the provisions of 28 U.S.C. Sec. 636(b)(1)(B) and (C) and Rule 29(A)(1) and (N)(3)(f) of the Rules of the United States District Court for the Eastern District of Virginia for report and recommendation. Report of the magistrate was filed on August 31, 1982 recommending dismisal of the petition. By copy of the report, each party was advised of his right to file written objections

to the findings and recommendations made by the magistrate. The court received objections from the petitioner on September 15, 1982.

The court, having examined the objections submitted by the petitioner to the magistrate's report and having made *de novo* findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the report of the United States Magistrate filed August 31, 1982 and it is, therefore, ORDERED that the petition be DENIED and DISMISSED on the basis of petitioner's procedural default in failing to raise the claim in his direct appeal to the Supreme Court of Virginia and that judgment be entered in favor of the respondent.*

The petitioner may appeal *in forma pauperis* from this *final order* by filing a *written* notice of appeal with the Clerk of this Court, Post Office Box 1318, Norfolk, Virginia, 23501, within thirty (30) days from this date. For the reasons stated in said report, the court, pursuant to

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* Petitioner contends in his "Motion of Objection and Exception" submitted in response to the Magistrate's Report and Recommendation that his allegation that the prosecution withheld evidence favorable to his case was not raised in the direct appeal of his convictions because of his attorney's failure to present the claim. Such claim of ineffective assistance of counsel is presented for the first time in this federal proceeding and will not be considered by the court at this juncture. Even were the court now to accept petitioner's new claim of ineffective assistance as an amendment to the current habeas petition, such claim would be foreclosed from federal review at this time on the basis of petitioner's failure to exhaust available state court remedies with respect to such claim in accordance with 28 U.S.C. Sections 2254 (b) and (c).

Further, as illustrated in the Appendix to the Magistrate's Report and Recommendation, at 6-8, a dismissal of a federal habeas claim as the result of a procedural default is not necessarily a dismissal with prejudice. Petitioner may well be able to establish "cause" for his default but should do so in the first instance in the Virginia courts.

Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of probable cause for appeal.

The Clerk shall mail a copy of this order to the petitioner and to counsel of record for the respondent.

J. CALVITT CLARKE, JR.
United States District Judge

Norfolk, Virginia
October 15, 1982

STATUTE INVOLVED

28 U.S.C. 2254 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * * *

EDITOR'S NOTE

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ORIGINAL

No. 84-1554

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner

v.

CLIFFORD W. CARRIER,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Grant 7/1/85

QUESTIONS PRESENTED

I. Whether this Court should overrule the holding of Wainwright v. Sykes which held that a federal court may reach the merits of a constitutional issue on habeas corpus (other than the issue of ineffective assistance of counsel) by a showing of "cause" to remove the barrier of failure of counsel in state court to preserve the issue.

II. Whether Virginia law provides a remedy for a prisoner to exhaust when he alleges attorney error as "cause" under Wainwright v. Sykes in seeking to reach the merits of a constitutional issue, and not attorney error as an independent denial of due process by establishing ineffectiveness of counsel.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-1554

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Virginia's Statement of the Case is not incorrect but may mislead the reader as to the actions taken by Carrier's attorney at the state court trial on the rape charges and on direct appeal as well as actions and litigation posture taken by his present counsel in the U.S. Court of Appeals for the Fourth Circuit after federal habeas corpus was denied.

At respondent's 1977 rape trial in Virginia court he was twice denied discovery of the prosecutrix' statements to police describing the crime on the theory, expressly articulated by the trial court, that a defendant has a right to examine only "exculpatory" material in the possession of

the prosecution. There is no dispute that the trial court erred. The proper test under the due process clause in cases where a defendant specifically describes the evidence at issue is whether the judge finds it "material" on the issue of guilt. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97, 106 (1976).

Defense counsel carefully preserved objections in the trial court, and his notice of appeal to the Virginia Supreme Court alleged that refusal to permit inspection of the prosecutrix' statement was reversible error. Counsel did not brief the issue on appeal, however, and thus it was lost as a matter of Virginia law.

The prisoner Carrier, in pro se documents filed in the U.S. district court, contended that this failure to brief was "eneffective [sic] assistance of counsel."

It is important to observe that Virginia concedes (Petn. for Cert., p. 4, at top) what the records shows: that Carrier made the allegation of ineffective assistance of counsel in U.S. District Court as a basis for cause to excuse the procedural default and not as an independent due process violation that would require vacating his conviction. Carrier made the allegation in a "Motion of

Objection and Exception" (4th Cir. App.* pp. 83-84) he submitted in response to a recommendation of a magistrate that he had not shown "cause" under Wainwright v. Sykes, 433 U.S. 72, 84 (1977), to avoid the consequences of the procedural default in state court.

The question whether there was attorney error of such magnitude as to independently establish a due process violation under Strickland v. Washington, 104 S. Ct. 2052 (1984) has never been presented in this case. In arguing the "cause" issue under Wainwright on appeal, appointed counsel initially contended that the record showed such an egregious error as would meet the strict due process test. (Cert. App. pp. 23-25). The certiorari petition says (p. 4, n. 3) the "Sixth Amendment claim was expressly abandoned in oral argument in the Court of Appeals below." That is correct insofar as what we abandoned was the contention that the record showed on its face such serious attorney error as

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*This abbreviation is used to refer to the joint appendix filed by the parties in the U.S. Court of Appeals for the Fourth Circuit upon appeal of the district court order denying habeas corpus relief. The abbreviation Cert. App. will be used to refer to the "Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit" filed by Virginia with this Court.

would independently (of the Brady claim) be a basis for relief.*

It is also important to observe that Carrier has at no time contended that he was not required to exhaust in Virginia courts any remedy provided there involving an allegation of ineffective assistance of counsel. See Appellant's Opening Brief (in the U.S. Court of Appeals for the Fourth Circuit) at pp. 16-24. Obviously, if this court holds that Carrier cannot benefit under Wainwright v. Sykes by a showing of attorney error that does not meet the tough Strickland test, he must return to state court. The Strickland issue has not been presented there, and we know that Virginia will follow the federal definition of "ineffective assistance of counsel" (Brief of Appellee in the Fourth Circuit, appendix at A).

But Virginia courts are not required to grant habeas corpus relief in every situation where a federal court would. Virginia is free to reject Wainwright and to hold

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*As advocates for Carrier, appointed counsel have never conceded that, were Carrier to allege ineffective assistance of counsel as an independent basis for relief, he could not prove a case under that theory. It is possible that an evidentiary hearing might show an almost wilful abandonment of the winning argument on direct appeal stemming from counsel's anger at Carrier. In any event, since the Strickland issue has never been presented in any pleading in this case, nothing counsel said at oral argument in the Court of Appeals for the Fourth Circuit should prejudice Carrier if he is able subsequently to allege a claim for relief under Strickland.

that there can be no showing of cause in state habeas corpus proceedings to excuse the procedural default that would enable the court to reach the merits of the Brady issue. Carrier has asserted that Virginia does not recognize such "cause" in the form of attorney error that does not meet the Strickland test. If Virginia did, there would be, as Carrier has always conceded, a state remedy that he not exhausted.

Because no evidentiary hearing was held in federal district court and because the indigent Carrier was not represented by counsel until appeal to the Fourth Circuit, the record is completely barren both of specific allegations concerning how the attorney error occurred and, of course, any evidence related to that issue. In the court below Virginia argued that it would be able to establish that Carrier's defense counsel made a deliberate, tactical choice to drop a Brady-based argument on appeal, which would preclude a finding of "cause" under Wainwright v. Sykes no matter what test was used:

> His counsel may well have known the contents of the victim's statements and may have thought that failure by the Trial Court to permit him to review them were [sic] inconsequential. He may have felt that to eliminate that claim from his Petition for a Writ of Error and to concentrate on others might give him a better chance to secure a Writ in the Supreme Court of Virginia. There are a myriad of explanations which may be advanced as to why Petitioner's counsel did not raise on appeal the issue.

Brief of Appellee (in the U.S. Court of Appeals for the Fourth Circuit) at p. 8.

REASONS FOR DENYING CERTIORARI

I. The Record Is Insufficient for Testing the Continued Viability of the Wainwright v. Sykes "Exception" to the Rule That Procedural Default in State Court Bars Review in Federal Habeas Corpus.

The holding of the majority of the Fourth Circuit en banc in this case is quite narrow: it is only that there must be "some circumstances" (Cert. App. 2) in which attorney error that is not independently a basis for habeas relief constitutes "cause" under Wainwright v. Sykes, allowing a court to proceed to the merits of the constitutional claim (which is not ineffective assistance of counsel). The court certainly does not hold, as Virginia suggests (Petn. for Cert. p. 9), that any case of attorney negligence or ignorance satisfies the Sykes "cause" requirement. The en banc majority refers favorably to the majority opinion of the Fourth Circuit panel in Carrier's case. It, too, holds only that there may be some circumstances where attorney error insufficient to qualify for relief under Strickland constitues Sykes "cause." The panel gave as an illustrative example a case where counsel "fails to exercise it [judgment] at all in dereliction of the duty to represent her client." (Emphasis added.)

Because there had been no evidentiary hearing in Carrier's case on the issue of why counsel abandoned the winning Brady argument on appeal, the court below was unable to formulate a definitive rule as to when non-Strickland error satisfies the Sykes test. One sees, however, from the

panel's example of an attorney who utterly fails to exercise judgment, that the court has in mind quite a serious error and by no means a rule for the Fourth Circuit that ignorance alone constitutes Sykes cause.

If certiorari is denied, the district court will be guided on remand by the panel opinion's qualification and the limitations of the en banc majority's narrow holding. It may well be, as Virginia has claimed, counsel's decision was tactical; or there may be error or ignorance not sufficiently serious to qualify as "cause." Certainly it is premature in Carrier's case for this court to clarify the meaning of "cause" under Sykes, since there is not yet a factual record on which to test various verbal formulations nor a specific holding of a lower court as to what type of error constitutes such "cause." Certiorari should be denied when there is an absence of facts on which to base a decision. See, e.g., Massachusetts v. Painter, 389 U.S. 560, 561 (1967) (certiorari dismissed because record not clear enough to permit decision of important constitutional issue); Gilbert v. California, 388 U.S. 263, 269 (1967) (certiorari dismissed when record revealed facts did not appear with sufficient clarity to decide issue).

True, a much broader issue is presented: whether the Sykes doctrine should simply be abolished. Although

Virginia tries to obsfucate things,* that is precisely what it is asking the Court to do. This Court in Sykes held that the cause-prejudice test laid out there was an "exception" (433 U.S. at 90) to a general rule that procedural default in state court barred federal habeas corpus relief; an exception that

> will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas corpus court from adjudicating the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. [Id. at 91.]

Clearly, the "constitutional claim" referred to is the claim allegedly lost due to procedural default. In Sykes the voluntariness of a confession under Jackson v. Denno, 378 U.S. 368 (1964) was at issue; in the case at bar it is a Brady issue. Put under the rule advanced by Virginia and the dissent below, the habeas court would never reach the merits of such constitutional claims. To establish "cause" to avoid the consequences of procedural default would ipso facto establish a Strickland denial of counsel and relief would be granted on that basis. That would be to overrule the above-quoted passage of Sykes. While Virginia ignores this paradox (defining "cause" in Sykes so as to eliminate the very rule for which the concept is to be used), the

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*See, e.g., Petn. for Cert. p. 9 contending that it is the majority view below that renders Sykes "virtually meaningless" when, as noted in this brief, the majority view is essential if Sykes is to remain viable doctrine.

amici curiae led by the attorney general of North Carolina face up to it. They contend that adoption of Virginia's position would not swallow up the "exception" carved out in Sykes because cause could still be found in "governmental prevention" and "failure to honor the procedural ground relied on." Brief of Amici Curiae for Petitioner on Behalf of the State of North Carolina, etc., at p. 4.

The amici err. If a state government applied coercion to a defendant to force him to waive a constitutional right in state proceedings, the aggrieved prisoner would surely be entitled to federal habeas corpus relief. There would not be the situation envisioned in the quoted passage from Sykes where the federal court, after finding cause, proceeds to address the merits of a different constitutional issue. Rather the situation would be like that which Virginia wants applied to the case at bar where the very proof of what is called "cause" under Sykes turns out to entitle the prisoner to relief without any additional consideration of fact or law by the court.*

As for "failure to honor," Carrier assumes the amici have in mind a case like NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). There it was alleged that the right to pursue a constitutional claim had been lost in state appellate court because the party proceeded by way of

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*I.e., just as Strickland error by counsel violates due process so would "governmental prevention."

certiorari rather than mandamus. A state court had so held but examination of published precedents showed that certiorari had been an authorized mode of review in similar cases. This court went to the merits. In such a case the ultimate holding is not that "cause" to excuse a procedural default has been shown, but that there was no procedural default.

Accordingly, the amici as well as Virginia are unable to explain how the dissenting view below in this case will not result simply in abolishing the Sykes doctrine, with the "exception" emphasized there being swallowed up by the general rule of no review in federal court.

Even if the overruling of Sykes is something this Court wishes to consider, this case is not an appropriate vehicle for doing so -- at least not yet. Whether Sykes is unworkable should be decided in the context of a record containing facts that illustrate the type of attorney error that could be held to constitute Sykes "cause" but not Strickland error. As Virginia correctly contended in the lower court, there are "myriads" of possible reasons why counsel acted in a manner that is now attacked as erroneous. (Brief, supra, at 8). By asking for a certiorari grant at this stage of the proceedings prior to an evidentiary hearing, it is Virginia that is, in its own words, "ask[ing] us to leap into the unknown."

II. One Circuit's Disagreement With the Holding Below Is Not Sufficient Reason for Granting Certiorari.

Virginia contends (Petn. for Cert. at 9-10) that decisions in the Second, Sixth and Eighth Circuits conflict. The Sixth and Eighth circuit cases cited are typical of many that have held that simple negligence or oversight by counsel does not constitute Sykes cause. These circuits have not considered considered the issue whether there could be a more serious attorney error which would qualify as "cause" under Sykes but not be so egregious as to call for relief under Strickland. These circuits are quite consistent with the panel opinion in the case at bar which agreed that not all attorney error would be "cause" under Sykes.

The second circuit case cited, Tsirizotakis v. LeFevre, 736 F.2d 57, cert. den. 105 S. Ct. 216 (1984), does contain language inconsistent with the holding below but it is obvious that the court there failed to see the significance of that language. The prisoner there wished to constitutionally attack a charge to the jury and urged ineffectiveness of counsel as Sykes cause for avoiding the consequences of failing to object in state court. Immediately after citing Sykes the second circuit panel said it would be "reviewing petitioner's ineffective assistance of counsel claim under the Supreme Court's recent decision in Strickland v. Washington . . . ." 746 F.2d at 61. It then said the district court had correctly held that the conduct of counsel "constituted neither cause for the

procedural defaults nor independent constitutional violations warranting a grant of habeas corpus." Id.

Tsirizotakis thus failed to see that if Strickland principles alone were utilized in assessing alleged attorney error the issue of Sykes cause would vanish. The entire discussion consists of one paragraph of 20 1/3 lines.

The amici contend that the Fifth Circuit has sub silentio overruled decisions concededly in agreement with the majority in the case at bar. (Amici Brief at p. 4, n. 1). This is incorrect. Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981) says that a showing of "plain error" by counsel is not enough to establish cause under Sykes. There had to be some explanation made by the prisoner of the apparent error in failing to make an objection. "Hence," the Tyler court concluded, "the requisite showing of cause has not been made . . . ." Id. at 1101. The implication is that it would be possible to make a showing of cause based on attorney error that would lead the court to examine the merits of the constitutional issue, there the correctness of a jury charge on presumptions, rather than a showing that would result in granting habeas relief because of ineffective assistance of counsel.

Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981) likewise holds only that mere proof of a failure to object, with no explanation, would not establish Sykes "cause." Like Tyler, it is pregnant with the implications that a more substantial showing of attorney error would have led the

court to reach the merits of the constitutional issue involved there.

The panel opinion below indicates that not only the Fifth, Sixth and Eighth circuits (already discussed above) but also the Ninth and Tenth circuits agree with its view that it is possible for a prisoner to prove a serious attorney error that would not entitle him to relief under Strickland but would establish Sykes "cause." Since the panel decision the Seventh Circuit has expressed its agreement, in Clay v. Director, Juvenile Division, Dept. of Corrections, 749 F.2d 427 (7th Cir. 1984).

In sum, although there is a technical conflict in the circuits because of Tsirizotakis, the one contrary decision contains no analysis and is at odds with the approach in every other circuit. One maverick decision to the contrary should not make a well-analyzed, mainstream decision cert-worthy.

III. There is no Virginia Remedy to Exhaust.

Under 28 U.S.C. § 2254(b), "the remedies available in the courts of the State" must be exhausted. But it is only to the extent of "the question presented" in the federal habeas corpus action that exhaustion is required. 28 U.S.C. § 2254(c). The "Question" in our case is whether there was Brady error. Under § 2254(c) the fact that Carrier might be able to raise a different question if he wished to do so -- seeking relief directly under Strickland -- does not require

him to submit a Strickland claim to a state court before pursuing a Brady claim in federal court.

The panel quite correctly held that the question of what constitutes "cause" under Sykes is for federal courts alone and not part of what Carrier had to exhaust in state court.

As indicated above, Carrier has always conceded that if Virginia recognized as cause for excusing procedural default the same type of attorney error that federal courts do under Sykes, there would be a failure to exhaust in this case. In his opening brief in the Fourth Circuit, Carrier contended that any allegation of attorney error as such cause in the state proceedings would have been futile. Brief, p. 16. The only kind of attorney error Virginia recognized at the time was representation so ghastly as to render the trial as a whole a farce and mockery. Id., p. 17.

In reply Virginia cited an unpublished Virginia Supreme Court opinion following the Fourth Circuit's definition of ineffective assistance of counsel in the context of a sixth or fourteenth amendment claim based on lack of representation. Brief of Appellee (in the U.S. Court of Appeals for the Fourth Circuit) at p. 10 and Appendix, containing the 1983 opinion of Turner v. Morris. All this reply establishes is that if Carrier wished to pursue a Strickland claim in federal court he had a remedy to exhaust in Virginia, since it was now going to follow federal law on

habeas corpus in this regard rather than denying a remedy and remitting the state prisoner directly to federal court.

A Virginia court would not reach the Brady "question presented" here; if serious attorney error appeared to satisfy its Turner-Morris test, it would grant relief on that basis. If a lesser showing were made it would dismiss the petition for procedural default.

The Commonwealth attorneys have well understood Carrier's challenge in his opening brief to show what kind of a remedy he had in state court that would involve the state court considering his Brady claim. The reply brief below studiously avoids adverting to that and instead invites Carrier to try a Turner claim. The certiorari petition is similar. Not once is it suggested that Virginia has a remedy by which Carrier can get relief by pleading Brady coupled with an attorney error allegation presented as cause to avoid the consequences of procedural default.

Indeed, the only authority even hinting that Virginia would recognize a "cause" concept of attorney error when direct relief on the ground of ineffective assistance of counsel ground was unavailable was a federal district court opinion. Washington v. Downes, 475 F. Supp. 573 (E.D. Va. 1975), that had to be overruled by the court below in the

instant case because it was unsupportable.* Cert. App. 15 n. 9.

The result below does not conflict with Alcorn v. Smith, 724 F.2d 37 (6th Cir. 1983)*

In Alcorn, on the other hand, the Sixth Circuit surveyed Kentucky habeas corpus law and concluded that pursuing a Sykes style "cause" would not be futile. 724 F.2d at 40.

The scope of Virginia law was fully debated below. Judge Hall in his panel dissent thought Washington v. Downs, supra, was correct in predicting that Virginia would recognize a "cause" concept based on attorney error not serious enough to authorize relief on a theory of ineffective assistance of counsel. Challenged by Carrier to produce any authority in support of Washington v. Downs, the commonwealth attorneys were unable to do so. The state on

---

*Just why Washington was overruled is unclear in view of the panel majority's footnote 8 to the effect that it would not decide what remedies Virginia offered. Washington was correctly decided if in fact Virginia law is identical to the federal law developed under Sykes. It would appear that notwithstanding footnote 8, the panel majority had to have examined Virginia habeas corpus law. Of course, the reasoning of the en banc majority below is even more unclear since it did not specifically adopt the majority panel opinion but stated merely that it agreed with its reasoning on the issue of defining "cause" under the Sykes case. The en banc majority never even refers to the panel's discussion of exhaustion.

*In Alcorn certiorari was granted, 53 U.S.L.W. 3617. On May 13, 1985, judgment was vacated and the cause remanded for consideration of representations that the prisoner had in fact exhausted in Kentucky courts the matters the Sixth Circuit Court of Appeals was telling him he still had to exhaust. 53 U.S.L.W. 3807.

rehearing had a second chance to show there was some remedy for Carrier to exhaust in pursuing his Brady claim, but a majority of the court en banc was not convinced.

In any event, surely this Court has more pressing business to attend to than determining whether Virginia has a body of law analogous to the federal "cause" doctrine under Sykes. Granting certiorari seems especially inappropriate when the commonwealth attorneys both below and in the certiorari petition are unable to point to any clue that such a body of state law exists.

CONCLUSION

For the foregoing reasons, respondent Carrier prays that certiorari be denied.

June 5, 1985.

Respectfully submitted,

William A. Reppy, Jr.

William A. Reppy, Jr.
Attorney for Respondent

I certify that on this date copies of the above Memorandum were mailed, postage prepaid, to:

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June 5, 1985.

William A. Reppy, Jr.

William A. Reppy, Jr.

Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

(1)

No. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAR. 29, 1985
CERTIORARI GRANTED JULY 1, 1985

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21 pp

The following opinions and judgments, portion of brief, order, and statute involved have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

En Banc Opinion of the United States Court of Appeals for the Fourth Circuit, in *Carrier v. Hutto*, No. 83-6039 (February 7, 1985) ..... App. 1

Opinion of the United States Court of Appeals for the Fourth Circuit, No. 83-6039 (December 27, 1983) ..... App. 3

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Order of the Supreme Court of Virginia in *Carrier v. Mitchell* (Habeas Corpus Appeal), Record No. 800472 (June 12, 1980) JA-7

Motion of Objection and Exception filed by Clifford W. Carrier in the United States District Court for the Eastern District of Virginia, Norfolk Division, in *Carrier v. Hutto* (Federal Habeas Corpus Proceeding), No. 80-1041-N (October 18, 1982) JA-8

Order of the Supreme Court of Virginia in *Turner v. Morris*, Record No. 820828 (January 11, 1983) JA-13

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December 6, 1976—Indictments (Rape-Abduction-Maiming).

November 22, 1976—Motion for Discovery and Inspection.

January 24, 1977—Response to Motion for Discovery.

January 27, 1977—Letter dated January 26, 1977.

February 2, 1977—Letter to Court dated February 2, 1977.

February 7, 1977—Motion.

February 9, 1977—Letter from Court to Counsel.

March 21, 1977—Order (Pertaining to Discovery).

March 28, 1977—Order (Maiming-Dismissed on Motion).

June 22, 1977—Order (Judgment and Sentencing-Rape).

June 22, 1977—Order (Judgment and Sentencing-Abduction).

July 19, 1977—Order (Appointing Counsel to Perfect Appeal).

July 20, 1977—Notice of Appeal and Assignments of Error.

April 27, 1978—Order of Virginia Supreme Court (Refusing Appeal).

January 8, 1979—Order of United States Supreme Court (Denying Petition for Certiorari).

December 27, 1979—Petition for Writ of Habeas Corpus, Circuit Court of Virginia Beach, Virginia.

January 11, 1980—Motion to Dismiss filed by Commonwealth.

February 1, 1980—Motion for Appointment of Counsel and Rebuttal filed by Carrier.

February 5, 1980—Order (Dismissing Habeas Corpus Petition).

February 19, 1980—Notice of Appeal and Motion for Leave to Proceed in Forma Pauperis.

February 19, 1980—Order (Denying Appointment of Counsel and Transmitting Record to the Virginia Supreme Court).

June 12, 1980—Order of Virginia Supreme Court (Refusing Appeal).

FEDERAL HABEAS RECORD

September 19, 1980—Petition for Writ of Habeas Corpus, United States District Court for the Eastern District of Virginia, Norfolk Division.

September 29, 1980—Order (Filing Petition in Forma Pauperis).

October 2, 1980—Motion to Dismiss on Behalf of the Respondent.

November 13, 1980—Order (Directing Respondent to File Answer).

November 21, 1980—Brief in Opposition to Motion to Dismiss.

November 26, 1980—Answer.

December 11, 1980—Affidavit and Motion to Strike.

December 11, 1980—Motion for Appointment of Counsel and Evidentiary Hearing.

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August 31, 1982—Magistrate's Report and Recommendation.

October 18, 1982—Motion of Objection and Exception.

October 19, 1982—Order (Denying and Dismissing Petition).

October 19, 1982—Judgment Entered.

November 1, 1982—Notice of Appeal.

January 18, 1983—Certificate of Probable Cause Granted, United States Court of Appeals for the Fourth Circuit.

December 27, 1983—Opinion of the United States Court of Appeals for the Fourth Circuit.

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February 7, 1985—En Banc Opinion of the United States Court of Appeals for the Fourth Circuit.

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON THURSDAY THE 27TH DAY OF APRIL, 1978.

CLIFFORD W. CARRIER,

Appellant,

AGAINST

COMMONWEALTH OF VIRGINIA,

Appellee.

Record No. 771546
Circuit Court No. D-4489

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

Finding no reversible error in the judgments complained of, the court refuses the petition for appeal filed in the above-styled case.

The said circuit court shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

(Certificate and costs omitted in printing.)

(Please note: The following pleading is set forth verbatim.)

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

CLIFFORD W. CARRIER,

Petitioner

-V-

J.P. MITCHELL, WARDEN
VIRGINIA STATE PENITENTIARY,

Respondent.

At Law L-8931-A

MOTION FOR APPOINTMENT OF COUNSEL AND REBUTTAL

Comes now Clifford W. Carrier, in pro-se, and moves this court to deny respondents motion to dismiss. Petitioner gives the following support of his allegations as follows:

1. Petitioner admits to 1 & 2 in respondents motion, but abjects to 3, 4 & 5.

2. Petitioner offers in support of his allegation of the Commonwealth witholding statement made by the prosicution's wittness Diane Lewis, that this is newly discovered evidence (See Exhibit I). Petitioner contends that this is in violation of his 14th Amendment of the Constitution, in the due process clause as refered in the case of *Brady -v- Maryland* 373 - US 83. and as stated in the Constitutional Law

-257 "Suppression by prosecution of evidence favorable to any accused upon request violates due process evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution. XX U.S.C.A. Const. Amend. 14. Petitioner contends that he had no way of properly cross examining this wittness without this statement being made available to him after his request was made. Therefore, harmful error was made and he was denied due process of Law. Petitioner contends that as in the "*Brady*" case the only remedy is that the conviction be set aside and that he be granted a new trial.

3. Petitioner contends that he should not be made to document all his claims without benifit of counsel, and request that counsel be appointed so that he may produce a more colorable claim in this court. Also, that his constitutional rights may further be protected.

WHEREFORE, petitioner prays that this court will deny respondents motion to dismiss, and grant the petition for the writ of habeas corpus and appoint counsel.

Respectfully submitted,

/s/

Clifford W. Carrier, No.

(Jurat omitted in printing.)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 12th day of June, 1980.

CLIFFORD E. CARRIER,

Appellant,

AGAINST

J. P. MITCHELL, WARDEN of the Virginia State Penitentiary,

Appellee.

Record No. 800472
Circuit Court No. L-8931A

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

And it is ordered that the Commonwealth recover of the appellant the costs in this court and the court below.

(Certificate and costs omitted in printing.)

(Please note: The following pleading is set forth verbatim.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK, VIRGINIA

CLIFFORD W. CARRIER, No. 112229

Petitioner

v.

TERRELL D. HUTTO, Director of the Virginia Department of Corrections.

Respondent.

CIVIL ACTION
NO. 80-1041-N

MOTION OF OBJECTION AND EXCEPTION

This action comes as a result of the action taken pursuant to a decision considered and rendered adverserly to the Petitioner in an action under 28 U.S.C. See. 2254. The matter was referred to a United States Magistrate, "James T. Turner, Norfolk, Virginia" by order of Provisions 28 U.S.C. See. 636 (b) (1) (b) and (c) and Rule 29 (a) (1) and (n) (3) (f) of the Rules of the United States District Court for the Eastern District of Virginia.

Comes now your Petitioner, Clifford W. Carrier, no. 112229, in the case of *Clifford W. Carrier* vs. *Terrell D. Hutto*, Director of the Department of Corrections; case no.

80-1041-n pursuant to 28 U.S.C. See. 636 (b) (1) (c), permitted by Rule 6 (e) of the Federal Rules Civil Procedure.

1. Petitioner is making his Objection and Exception praying that this court will grant your petitioner the relief as sought in his petition for a writ of habeas corpus, which was filed in this court against the lower court for violation of his (petitioner's) Constitutional Rights, which was guaranteed him by the United States Constitution; and present the following as a matter of fact and a matter of record as follows.

2. It is a fact that the petitioner is a convict serving his sentence of forty-five (45) years in the Virginia State Penitentiary, but is presently confined at the *Deerfield Correctional Center in Capron, Virginia.*

3. Petitioner further submits that the Magistrate's Report and recommendations should not be allowed to stand and contends that his case warrants further review of the record by this court.

4. Petitioner alleges that there is evidence which is and was at all times present on the face of the record which will prove that this court does have Authority to grant him the relief as sought in his habeas corpus and appeal filed in the lower court, and which is a matter of record. (See Transcripts of Proceedings) (tr.-Vol.-1-pg.4) and also see: (tr. Vol.-2 pg.151-2), which amounts to the conditions of *Jackson* v. *Virginia*, and or *Jackson* v. *United States*, (1979); which was present at all times at the lower court level, which in the petitioner's case at hand violated the condition of *Jackson* v. *Virginia*, as mentioned.

5. While it may be true and also show on the fact of the record that the petitioner did not directly present his claim as alledged in his habeas corpus directly to the State Su-

preme Court by way of direct appeal, but your petitioner will assure the court by evidence that it was not due to any fault of his, by way of the lower court's records and appeal from that decision, that such actions was the results of eneffective assistance of counsel. See: *Cuyler* vs. *Sullivan*, 446 U.S. 335 (1980).

6. Petitioner was not allowed by his then court-appointed attorney to fully take part in the preparation of his appeal, nor was he allowed to apraise it before it had been filed and denied by the State Supreme Court of Virginia. However, the petitioner stands firm on the cases of *State of Washington* v. *Myer*, 646 F.2d 355(1980-82) and a 4th. Cir, rulings in *Jiminez* vs. *Estelle*, 557 F.2d 506 (1977). Judge Tuttle's Analysis of *Wainwright's* case and prejudice test in Jiminez; also *Bailey* v. *Commonwealth*, 193 Va. 814,71 S.E.2d 368(1952), *Ferguson* v. *Boyd*, 566 F.2d 873(4th.Cir. 1977), which is to support and protect petitioner's position against the *Wainwright* v. *Sykes* case.

7. Petitioner further contends that in order for the Respondent's and the Magistrate's Recommendations to stand or survive against the petitioner's contentions as stated in his habeas corpus, and to deny him (petitioner) the relief sought , the respondents and the magistrate's report cannot simply stand on the contentions of *Wainwright* vs. *Sykes*, as a basis for a denial of petitioner's constitutional rights, which was knowingly violated by the lower court, nor can *Wainwright* vs. *Sykes* case justify such violations which has not as of yet been denied by the respondent, when petitioner's court documentations along with other evidence can prove that such violation did occur and is undenialable. The only way that petitioner can truly prove his contentions is by ordering an evidentiary hearing. See: *Fay* v. *Noia*, 372 U.S. at 439, *Stone* v. *Powell*, 428 U.S. 465 (1976) and *Frazier* v. *Weatherholtz*, 572 F.2d 994 (4th.Cir.1978).

Petitioner is entitled to a evidentiary hearing in order for the state to prove that the respondents have a violate claim of a denial of *Wainwright* v. *Sykes*, in or on the state court level. See. *Humphrey* v. *Cady*, 405 U.S. 904, 517 (1972). The burden is on the state to show that without a doubt the petitioner made a deliberate waiver of his claim in state court.

However, in petitioner's case the petitioner can show by the record that he did properly make his objections to the court, (pre-trial court) and before the bar at trial court. But due to ineffective assistance of counsel during the filing of his appeal, the failure to raise it on direct appeal does not bar either state or federal post-conviction relief. See: *Ferguson* vs. *Boyd*, 566 E.2d 873 (4th. Cir. 1977).

Furthermore, it is contended in as much the contention of the Magistrate's Report is concerned and the finding of fact as to the contemporaneous objection rule, the record see: (tr. Vol. 1 pg. 4) and also (tr. Vol. 2 pg. 151-2). shows that petitioner at his jury trial, and prior thereto see: *Ferguson Supra*, as to *Wainwright*, *Supra*, for further support in conclusion, petitioner cites State of *Washington* vs. *Myers*.

CONCLUSION

Petitioner states that for the foregoing herein enferred and the facts and laws cited especially the cases of which shows that there was a question as to the Legalizality of his conviction during and prior to his trial, the petitioner prays that this court will further review his case in the light most favorable to the petitioner, since such Constitutionality and due process was denied him at petitioner's trial. See the cases within.

Respectfully Submitted,

/s/

Clifford W. Carrier, No. 112229
Deerfield Correctional Center
Route 1 Box 22
Capron, Virginia 23829

(Jurat omitted in printing.)

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 11th day of January, 1983.

WILLIE LLOYD TURNER,

Appellant,

AGAINST

EDWARD C. MORRIS, SUPERINTENDENT,
MECKLENBURG CORRECTIONAL CENTER,

Appellee.

Record No. 820828
Circuit Court No. CL-195-81 (H.C.)

FROM THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

Upon review of the record in this case and in consideration of the arguments made in support of and in opposition to the granting of an appeal, and applying the standard of *McMann v. Richardson*, 397 U.S. 759 (1970), and *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied* 435 U.S. 1011 (1978), the court is of opinion that the trial court did not err in dismissing appellant's allegation XII upon a review of the record without taking additional evidence. *Arey v. Payton*, 209 Va. 370, 164 S.E.2d 691 (1968).

And the court is of further opinion that the trial court did not err in dismissing appellant's allegation XVI after review of the record without taking additional evidence. *Whitley v. Commonwealth*, 223 Va. 66, 286 S.E.2d 162 (1982).

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal. Code § 8.01-675.

The said circuit court shall allow court-appointed counsel the total fee set forth below and also their necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this court and in the court below.

(Certificate and costs omitted in printing.)

EXCERPT FROM BRIEF OF APPELLEE TERRELL D. HUTTO FILED IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* * *

Petitioner then admits, *arguendo*, that he is required to first attempt to exhaust his available State remedies in the State courts but asserts that no State court remedy is available because, he claims, any attempt on his part to obtain habeas corpus relief would be futile.[2] His conclusion is based upon the premise that the Virginia Supreme Court only utilizes the "farce-mockery" test in determining issues relating to the effective assistance of counsel.[3] Petitioner points out that this standard was expressly rejected by this Court in *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977).

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[2]In *Slayton*, *supra*, the Court stated at 215 Va. at p. 29, as follows:

> Assuming, without deciding, that petitioner was subject to an unconstitutional identification procedure, the court below erred, *absent a showing of ineffective assistance of counsel in failing to raise that question*, in permitting inquiry on this question for the first time in the habeas corpus proceeding. (Emphasis supplied).

[3]*See*, *Slayton* v. *Weinberger*, 213 Va. 690, 194 S.E.2d 703 (1973).

Petitioner, it is clear, is unaware that the Virginia Supreme Court recently has begun to apply the *Marzullo* standard.[1]

Although this Court in *Crowell, supra*, did not specifically take up the argument that use by the Virginia Supreme Court of the "farce-mockery" test excused failure to attempt to exhaust available State court remedies, this Court did state that if the error complained about was as "apparent" as Petitioner made it out to be, he "could doubtless present a colorable argument claiming that the failure to make the objections to the use of the statements deprived him of the adequate assistance of counsel." (591 F.2d at p. 1259, n. 2).

Petitioner's additional conclusion that the ineffective assistance of counsel could never be shown if the "farce-mockery" standard were utilized in the instant case, again, is without foundation. The only thing that can be said is that the correctness of his conclusion could only be known after *evidence* relating to counsel's conduct was presented in the state courts—and this has not occurred.

* * *

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[1]*See*, Order entered by the Virginia Supreme Court of January 11, 1983, in *Turner* v. *Morris*. This is an unpublished Opinion. Respondent's App. p. A.

STATUTE INVOLVED

VIRGINIA CODE

§ 8.01-654. When and by whom writ granted; what petition to contain.

—A. The writ of habeas corpus ad subjiciendum shall be granted forthwith by any circuit court, to any person who shall apply for the same by petition, showing by affidavits or other evidence probable cause to believe that he is detained without lawful authority.

B. 1. With respect to any such petition filed by a petitioner held under criminal process, and subject to the provisions of § 17-97 of this Code, only the circuit court which entered the original judgment order of conviction or convictions complained of in the petition shall have authority to issue writs of habeas corpus. If a district court entered the original judgment order of conviction or convictions complained of in the petition, only the circuit court for the city or county wherein the district court sits shall have authority to issue writs of habeas corpus. Hearings on such petition, where granted in the circuit court, may be held at any circuit court within the same circuit as the circuit court in which the petition was filed, as designated by the judge thereof.

2. Such petition shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.

3. Such petition may allege detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended or is to

be served subsequently to the sentence currently being served by petitioner.

4. In the event the allegations of illegality of the petitioner's detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.

5. The court shall give findings of fact and conclusions of law following a determination on the record or after hearing, to be made a part of the record and transcribed.

6. If petitioner alleges as a ground for illegality of his detention the inadequacy of counsel, he shall be deemed to waive his privilege with respect to communications between such counsel and himself to the extent necessary to permit a full and fair hearing for the alleged ground.

Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,

Petitioner,

v.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

---

BRIEF ON BEHALF OF PETITIONER

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QUESTIONS PRESENTED

1. Whether attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of the Sixth Amendment, is sufficient to establish the "cause" required to excuse a procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977).

2. Whether the exhaustion requirement of 28 U.S.C. § 2254 may be circumvented merely because a claim of attorney error is asserted to establish "cause" under *Wainwright v. Sykes* rather than as an independent ground for habeas corpus relief.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1554

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,

Petitioner,

v.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

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BRIEF ON BEHALF OF PETITIONER

OPINIONS BELOW

The per curiam 5-4 opinion[1] of the en banc Court of Appeals is reported at 754 F.2d 520 and appears in the Petition Appendix at pages 1-2. The majority opinion of the

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[1]Judges J. Harvie Wilkinson, III, and Emory M. Sneeden were appointed to the Fourth Circuit after this case was argued, and they did not participate in the decision.

panel[2] of the Court of Appeals, adopted by the en banc majority as the basis for its decision, is reported at 724 F.2d 396 and is included at pages 3-15 of the Petition Appendix.

JURISDICTION

The judgment of the panel majority of the Court of Appeals was entered on December 27, 1983. (Pet. App. 3). The en banc opinion, on rehearing, was entered on February 7, 1985. (Pet. App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The relevant statutory provisions are 28 U.S.C. § 2254 and Virginia Code § 8.01-654. Section 2254 is reproduced at App. 29 of the Petition Appendix. Section 8.01-654 is reproduced in the Joint Appendix at 17-18.

Rule 5:21 of the Rules of the Supreme Court of Virginia, at the time of Carrier's criminal trial and direct appeal,[3] provided:

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[2]One of the two majority members of the panel was the Honorable Charles E. Wyzanski, Jr., Senior United States District Judge for the District of Massachusetts, sitting by designation. (Pet. App. 3).

[3]The substance of former Rule 5:21 is now contained in essentially the same form in Rules 5:17(c) and 5:25.

> The petition for appeal shall contain assignments of error and the form, contents and length of the petition for appeal shall conform in all respects to the requirements of the appellant's opening brief. Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below. An assignment of error which merely states that the judgment is contrary to the law and the evidence is not sufficient.

STATEMENT OF THE CASE

The respondent, Clifford W. Carrier, was convicted of rape and abduction in March, 1977. Prior to trial, counsel for respondent moved for discovery of the victim's statements. The judge examined the statements, found that they were not exculpatory, and denied the motion. Carrier's counsel requested the statements again immediately before trial, but the judge denied the request for the same reason. The statements were ordered sealed, and counsel formally objected to the trial court's ruling. (Pet. App. 5).

Carrier's notice of appeal to the Virginia Supreme Court assigned as error, *inter alia*, the trial court's ruling prohibiting defense counsel from examining the statements, either prior to or during the trial. Carrier, however, abandoned this discovery claim in his petition for appeal. In April, 1978, the Supreme Court of Virginia refused Carrier's petition for appeal. (J.A. 4). His petition to this Court for writ of certiorari was denied on January 8, 1979. *Carrier v. Virginia*, 439 U.S. 1076 (1979).

On February 5, 1980, Carrier filed a habeas corpus petition in state circuit court, alleging that withholding the victim's statements from trial counsel was a denial of due process under the Fourteenth Amendment. The circuit court dismissed the petition because Carrier had failed to pursue this claim on direct appeal.[4] The Virginia Supreme Court affirmed the circuit court's dismissal of the petition in an unpublished order dated June 12, 1980. (J.A. 7).

In September, 1980, Carrier filed a habeas corpus petition, under 28 U.S.C. § 2254, in the United States District Court for the Eastern District of Virginia. He alleged that he was denied due process because the prosecution deliberately withheld the victim's statements from defense counsel and because the trial court denied his discovery request. The Commonwealth moved to dismiss the petition, arguing that (1) failure to raise these issues on direct appeal barred collateral attack under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and (2) Carrier had not exhausted state remedies.[5] In August, 1982, the United States Magistrate recommended dismissal of the petition on the basis of Carrier's procedural default in failing to raise his claim on direct appeal. Carrier then filed a "Motion of Objection and Exception" to the Magistrate's report, arguing that his procedural

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[4]Under Virginia law, only errors asserted in the petition for appeal will be noticed by the Virginia Supreme Court. (Va. S.Ct. R. 5:21). While Carrier did assign the discovery issue as error in his notice of appeal, he neither assigned nor briefed it in his petition for appeal. Errors that could have been raised on appeal generally may not be raised for the first time in collateral post-conviction proceedings. *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975).

[5]As pointed out by the Court of Appeals below, the Commonwealth anticipated that in amended pleadings Carrier might assert ineffectiveness of counsel as the cause for omitting his claim on direct appeal. (Pet. App. 6).

default should be excused "due to ineffective assistance of counsel . . . ." (J.A. 11).

In October, 1982, the District Court approved the Magistrate's report and held that the discovery claim was barred by procedural default. (Pet. App. 27-29). The District Court also stated that Carrier must establish "cause" for the procedural default, "in the first instance," in the Virginia state courts. (Pet. App. 28).

Carrier appealed to the United States Court of Appeals for the Fourth Circuit. In his brief, he asserted ineffective assistance of counsel as "cause" to excuse the procedural bar under *Wainwright v. Sykes*. (Pet. App. 23-25). He argued that his attorney's failure to pursue the discovery issue on appeal also constituted ineffective assistance of counsel in violation of the Sixth Amendment. (Pet. App. 23). This Sixth Amendment claim was expressly abandoned, however, at oral argument in the Court of Appeals.[6] *See* 724 F.2d at 400. (Pet. App. 9).

On December 27, 1983, a panel of the Court of Appeals, in a 2-1 decision, reversed the District Court's order and remanded the case for further proceedings. The panel stated that the central issue was whether a single act or omission by counsel, insufficient by itself to contravene the Sixth Amendment, may satisfy the "cause" prong in *Sykes* thereby permitting substantive consideration of a claim not previously raised. (Pet. App. 9). The panel then held that "attorney error short of wholesale ineffectiveness of counsel can constitute [*Sykes*] cause, provided that the act or omis-

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[6]Nevertheless, Carrier has pointed out in this Court that he has not conceded that he could not show ineffectiveness of his appellate counsel under the standard of *Strickland v. Washington*, ____ U.S. ____, 104 S. Ct. 2052 (1984), should he choose to seek relief on that basis. (Br. Opp. 4 n.*).

sion resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy." (Pet. App. 11-12). The panel defined attorney error as the failure of trial counsel to exercise judgment, through ignorance or oversight, "in dereliction of the duty" to represent the client. (Pet. App. 12).

The panel also held that the District Court erred in ruling that Carrier must first present his claim of attorney error to the state courts. "The exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of [*Sykes*] cause and prejudice." (Pet. App. 14). The panel remanded the case for the District Court to determine (1) "cause"—whether counsel's failure to appeal the discovery claim was in fact attorney error or a strategic act by counsel—and (2) "prejudice" under *Sykes*. (Pet. App. 15).

Judge Hall, in his dissent, found no basis for remand because petitioner had not alleged any prejudice, and because the alleged attorney error could not constitute *Sykes* "cause." He observed that "[u]nder the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under [*Sykes*]), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the [*Sykes*] bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule." (Pet. 20). Judge Hall also noted that the alleged attorney error should have been raised in Carrier's state habeas petition and, "even if petitioner could prove cause and prejudice under the [*Sykes*] exception, the case still must be dismissed for failure to exhaust state remedies." (Pet. App. 22).

On February 7, 1985, the en banc court adopted the panel majority's decision in a 5-4 per curiam opinion. The four

dissenting judges, including Judge Hall, adopted the panel dissent. (Pet. App. 2).

On July 1, 1985, this Court granted Virginia's petition for a writ of certiorari to consider (1) whether attorney error, not rising to the level of ineffective assistance of counsel, constitutes "cause" under *Wainwright v. Sykes*, and (2) whether the exhaustion requirement is applicable to a claim of attorney error which is asserted as "cause" but not as an independent ground for habeas corpus relief. ____ U.S. ____, 105 S.Ct. 3523 (1985).

SUMMARY OF ARGUMENT

The decision of the court below that attorney error not amounting to ineffective assistance of counsel can constitute "cause" under *Wainwright v. Sykes*, 433 U.S. 72 (1977), is irreconcilable with prior decisions of this Court. A criminal defendant's right to a fair trial is adequately protected against harm flowing from attorney error by the Sixth Amendment right to the effective assistance of counsel. The contrary conclusion reached by the court below is inimical to our adversarial system of criminal justice, and if not reversed by this Court, will unnecessarily exacerbate the burden upon the lower federal courts, and frustrate the interests of finality, comity, and federalism which *Sykes* was intended to foster.

A state prisoner who petitions a federal court for a writ of habeas corpus should not be permitted to circumvent the exhaustion requirement of 28 U.S.C. § 2254 merely by changing the label on his claim of attorney error. Whether the claim of attorney error is asserted as a Sixth Amendment violation or as mere ignorance or inadvertence, if the assertion of attorney error is essential to the habeas petitioner's claim for relief, as it is here, the principles which form the basis of the exhaustion requirement dictate that

the issue of attorney error must first be presented to the state courts. Thus, the court below erred in ruling that the exhaustion requirement is inapplicable to a claim of attorney error when it is asserted as cause for a procedural default rather than as an independent claim for relief.

In the instant case, it is undisputed that Carrier has never presented his claim of attorney error, in any form, to the Virginia courts. Since under Virginia law attorney error of sufficient magnitude is recognized as cause for a procedural default, Carrier has an available state remedy which he has not exhausted.

ARGUMENT

I.

ATTORNEY ERROR NOT CONSTITUTING SIXTH AMENDMENT INEFFECTIVENESS OF COUNSEL IS NOT "CAUSE" UNDER *WAINWRIGHT V. SYKES* TO EXCUSE PROCEDURAL DEFAULT.

A. Prior decisions of this Court compel the conclusion that mere attorney error is not "cause."

Settled precedents of this Court control this case. Those precedents require rejection of Carrier's argument that mere attorney error is sufficient "cause" on federal collateral review to excuse a procedural default in the state courts. The Fourth Circuit's conclusion that non-tactical attorney error may constitute adequate "cause" is wholly at odds with the sound reasoning of those decisions.

In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court held that a state prisoner who procedurally defaults by failing to comply with a state's contemporaneous objection rule is barred from obtaining federal habeas corpus review of the claim, unless he can show cause for the default and actual prejudice. 433 U.S. at 87. Subsequently, in *Engle v. Isaac*, 456 U.S. 107 (1982), the Court had occasion to consid-

er the adequacy of an assertion of "cause." The procedural default in that case was defense counsel's failure to object to a burden-shifting jury instruction. The Court said:

> We do not suggest that every astute counsel would have relied upon *Winship* to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims. Counsel might have *overlooked* or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will *recognize* and raise every conceivable constitutional claim. *Where the basis of a constitutional claim is available*, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged *unawareness* of the objection as cause for a procedural default.

456 U.S. at 134 (emphasis added). The Court also noted that in a procedural default situation "[c]ounsel's default may stem from simple ignorance or the pressures of trial." *Id.* at 129 n.34. Nevertheless, the Court found that "cause" had not been established. The Fourth Circuit's holding below is directly contrary to the reasoning of *Isaac*.

Other decisions of this Court also compel the conclusion that mere attorney error does not constitute "cause." For example, in *Hankerson v. North Carolina*, 432 U.S. 233 (1977), the Court held *Mullany v. Wilbur*,[7] which proscribed requiring a criminal defendant to negate any ele-

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[7]421 U.S. 684 (1975).

ment of the offense, to be fully retroactive. Rejecting the State's plea that retroactivity could have dire consequences, the Court said:

> If the validity of such burden-shifting presumptions were as well settled in the States that have them as respondent asserts, then *it is unlikely that prior to Mullaney many defense lawyers made appropriate objections* to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. *The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error.*

432 U.S. at 244 n.8 (emphasis added).

It is difficult to conceive of a tactical or strategic reason for not objecting to an improper burden-shifting instruction. Such a failure in virtually all instances would be the result of attorney error or oversight. Therefore, the Fourth Circuit's holding in this case that inadvertent "attorney error" or error emanating from ignorance constitutes "cause" under *Sykes* is squarely irreconcilable with the reasoning of *Hankerson*.[8] *See also Isaac*, 456 U.S. at 134 n.43.

This Court's decision in *United States v. Frady*, 456 U.S. 152 (1982), also demonstrates that mere attorney error cannot constitute "cause." On collateral attack of his federal murder conviction, Frady contended that erroneous jury instructions relieved the prosecution of the burden of proving malice, an element of the offense. He asserted that the

[8]Additionally, in *Lee v. Missouri*, 439 U.S. 461, 462 (1979), this Court indicated that *Wainwright v. Sykes* could insulate convictions from the retroactive application of *Duren v. Missouri*, 439 U.S 357 (1979), which invalidated certain automatic statutory exemptions from jury service.

"plain error" rule allowed for review of his objection despite his procedural default in not objecting at trial or on direct appeal. This Court rejected his argument and held that the "plain error" standard is "out of place" when a prisoner launches a collateral attack on his conviction after society's legitimate interest in the finality of the judgment has been perfected by affirmance of the conviction on direct appeal. 456 U.S. at 164. *See also Isaac*, 456 U.S. at 134-135.

Even on a federal direct appeal, recourse may be had to the "plain error" exception "only on appeal from a trial infected with error so 'plain' the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Frady*, 456 U.S. at 163. Negligence, ignorance or inadvertence on the part of defense counsel certainly must be assumed under such circumstances. *A fortiori*, on collateral review of a state conviction, where considerations of comity and federalism are involved, such attorney negligence, ignorance or inadvertence cannot be "cause" to excuse a procedural default.[9]

[9]Most federal circuits which have addressed the question now appear to have rejected the kind of reasoning applied by the Fourth Circuit in the instant case. *See, e.g., Tsirizotakis v. LeFevre*, 736 F.2d 57, 62 (2d Cir.), *cert. denied*, 105 S.Ct. 216 (1984) (if acts or omissions of counsel are asserted as "cause" under *Sykes*, they must amount to ineffectiveness of counsel "of constitutional dimensions"); *Indiviglio v. United States*, 612 F.2d 624, 631 (2d Cir. 1979), *cert. denied*, 445 U.S. 933 (1980) ("requirement of showing cause would effectively be eliminated" if the court accepted defense counsel's neglect as "cause"); *Marks v. Estelle*, 691 F.2d 730, 735 (5th Cir. 1982), *cert. denied*, 462 U.S. 1120-1121 (1983) (rejecting as "cause" the attorney's failure to investigate and discover the inadmissibility of certain evidence, because this "would effectively eliminate any requirement of showing cause at all"); *Long v. McKeen*, 722 F.2d 286, 289 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1608 (1984) (attorney's ignorance of the law or a mistake in judgment, "including . . . an irrational belief that raising a particular claim would confuse a jury" is not "cause");

Carrier argues that the Fourth Circuit's "standard" in this case does not accept all attorney error as "cause" but only indicates that, under "some circumstances," such error may be "cause." He suggests that the Court had "in mind quite a serious error and by no means a rule . . . that ignorance alone constitutes *Sykes* cause." (Br. Opp. 7). If this interpretation is correct, then the Fourth Circuit has provided no meaningful and workable standard at all.[10]

Nutall v. Greer, ____ F.2d ____, 37 Cr.L. 2283 (7th Cir. June 11, 1985) (mere neglect in failing to appeal an issue is not "cause"); *Thomas v. Auger*, 738 F.2d 936, 939 (8th Cir. 1984) (defense counsel's non-tactical failure to raise a claim, due to negligence, is not "cause"); *Palmes v. Wainwright*, 725 F.2d 1511, 1525 (11th Cir.), *cert. denied*, 105 S.Ct. 227 (1984) (defense attorney's "ignorance of the facts" or non-tactical failure to object to arrest was not "cause"). *Cf. United States v. Brown*, 663 F.2d 229, 231-232 (D.C. Cir. 1981) (en banc) (where defense counsel decided an objection would not be successful and his failure to object "did not fall below the level of effective assistance of counsel, . . . there was no 'cause'" to excuse the default at the federal trial). *But see* (pre-*Isaac* cases) *Runnels v. Hess*, 653 F.2d 1359, 1363-1364 (10th Cir. 1981); *Jurek v. Estelle*, 593 F.2d 672, 682-683 (5th Cir. 1979), *vacated on other grounds*, 623 F.2d 929 (5th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). The question appears to have been noted but left undecided in the Third and Ninth Circuits. *See United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 443-444 (3d Cir. 1982); *Gibson v. Spalding*, 703 F.2d 362 (9th Cir. 1983).

[10]One federal district court recently concluded that, while *Carrier* says the test for cause is a lesser showing than a Sixth Amendment violation, "just what that lesser showing may be remains unclear." The court found that it was "[l]eft without an articulated standard." After finding that counsel's error was "inadvertent," the court relied on the Sixth Amendment test of effective assistance of counsel and denied the habeas petition. *Aillon v. State of Connecticut*, 597 F. Supp. 158, 164 (D. Conn. 1984). It appears that some federal district courts are finding it easier to address the merits of a habeas petitioner's claims than to grapple with the *Carrier* standard. *See, e.g., Hill v. Sielaff*, No. 85-0395-R, slip. op. at 2 (E.D. Va. June 25, 1985) ("Assuming, *arguendo*, that counsel's failure to object . . . was based

Moreover, the courts that have applied *Carrier* have not understood the decision to be that narrow.[11] That *Carrier* should be read so broadly is not surprising in view of the Fourth Circuit's explicit statement: "Assuming his attorney acted out of ignorance or inadvertence—which remains for the district court to determine—Carrier *has met* the [*Sykes*] cause requirement." 724 F.2d at 402 n.7. (Pet. App. 13 n.7, emphasis added).

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on unpreparedness or ignorance of law, *Carrier v. Hutto* . . ., this Court will briefly address the merits of petitioner's argument.")(Copies of this unpublished decision have been lodged in the Clerk's Office of this Court).

[11]For example, in *Briley v. Bass*, 584 F. Supp. 807, 817-818 (E.D. Va. 1984), the court indicated that under *Carrier*, simple ignorance or oversight of counsel would be "cause." Also, in addition to the similar interpretation suggested in *Hill v. Sielaff* (see footnote 10, *supra*), a federal district court recently held that under *Carrier* a habeas petitioner had shown "cause" for failing to raise all claims in his first state habeas petition as is generally required by state law. The court said, "If attorney error resulting from ignorance can constitute "cause" for a procedural default, *see Carrier v. Hutto* . . . , then certainly the ignorance of a *pro se* petitioner would be just as excusable." *Lopez v. Landon*, C.A. No. 84-1048-AM, slip. op. at 2 (E.D. Va. June 25, 1985) (copies lodged in the Clerk's Office of this Court). While, as Justice Blackmun noted in his concurring opinion in *Rose v. Lundy*, 455 U.S. 509, 525 n.2 (1982), a state "may adopt a rule directing defendants to present all their claims at one time" and a default under such a rule "would bar subsequent federal habeas corpus relief on additional grounds," under the *Carrier* rationale, at least as it is being applied by lower courts, only deliberate tactical defaults would be an enforceable bar. This Court pointed out in *Engle v. Isaac*, however, that a "decision to withhold a known constitutional claim resembles the type of deliberate bypass condemned in *Fay v. Noia*, 372 U.S. 391 (1963)," and that the "cause-and-prejudice standard is more demanding than *Fay's* deliberate bypass requirement. . . . " *Isaac*, 456 U.S. at 131 n.36.

B. Sound reasons support the conclusion that mere attorney error is not "cause."

1. The right to effective assistance of counsel adequately protects defendants.

When a criminal defendant points to inadequacies or errors of his attorney as an essential ground for securing relief, the Sixth Amendment right to effective assistance of counsel should provide the analytical framework rather than *Wainwright v. Sykes*. A criminal defendant is entitled to habeas corpus relief for mistakes of his attorney which are outside the range of reasonably effective assistance of counsel and deprive him of a fair trial. *See Strickland v. Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984). This clear, workable standard does not leave a criminal defendant without an adequate remedy. Even a single error or omission can be so serious that a finding of ineffective assistance of counsel in violation of the Sixth Amendment is warranted. *United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039, 2046 n.20 (1984).

For example, the Supreme Court of Virginia recently held that a trial attorney rendered ineffective assistance solely because he failed to object to a jury instruction invalidated seven months earlier by this Court. The Virginia Court said, "We are of opinion that a reasonably competent attorney in a criminal case would have known of a Supreme Court decision relating to such a fundamental right of an accused and would have objected to the instruction." *Stokes v. Warden*, 226 Va. 111, 118, 306 S.E.2d 882, 885 (1983).[12]

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[12]*Stokes* did not grant the petitioner a new trial because actual prejudice was not shown under the facts and circumstances of that case. 226 Va. at 118-119, 306 S.E.2d at 885-886.

A criminal defendant is guaranteed reasonably competent counsel, not infallible counsel. He assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. *See McMann v. Richardson*, 397 U.S. 759, 774 (1970). Fundamental fairness is not undermined unless counsel's error falls below an objective standard of reasonableness. *Strickland*, 104 S.Ct. at 2065. Nothing more should be required.

2. The Fourth Circuit's "cause" analysis would undermine the basic premises of our adversarial system.

The decision below has authorized a much broader and more intrusive inquiry into attorney performance than is generally necessary to determine allegations of ineffective assistance of counsel. In assessing a Sixth Amendment claim, a reviewing court must indulge a strong presumption that counsel's act or omission was a product of reasonable professional judgment. Unless the prisoner alleges facts which, if true, would overcome that presumption, no hearing is required. *Strickland*, 104 S.Ct. at 2066. The Fourth Circuit, however, has indulged a presumption that counsel's failure to appeal the discovery claim was the result of ignorance or inadvertence and has ordered the district court to conduct a hearing at which counsel's thought processes will be explored. (Pet. App. 14-15). Such an approach is inimical to our adversarial process.

The American adversarial system operates on the assumption that truth is best ascertained and justice is best secured through a process in which each party has the responsibility of developing and presenting its case to an impartial tribunal. *See Cronic*, 104 S.Ct. at 2045. Criminal defendants entrust their liberty to the skill of their attorneys every day. Except for certain fundamental matters

requiring a personal decision by the defendant,[13] the consequences of the attorney's acts and omissions fall upon the defendant. Provided the lawyer has afforded his client reasonably effective assistance of counsel, there is nothing untoward or inappropriate in this circumstance. *See Jones v. Estelle*, 722 F.2d 159, 165 (5th Cir. 1983) (en banc), *cert. denied*, 104 S.Ct. 2356 (1984). Indeed, "the representative character of the relationship between a lawyer and his client will tolerate no other result."[14] *Id.* at 165. *See also Sykes*, 433 U.S. at 89, at 91 (Burger, C.J., concurring), at 94 (Stevens, J., concurring); *Estelle v. Williams*, 425 U.S. 501, 512 (1976).

The possibility of State Bar sanctions against defense counsel is no substitute for enforcement of procedural default rules. In the vast majority of the default situations encompassed by *Carrier*, defense counsel will have been diligent and constitutionally effective, but not perfect or infallible. Sanctions against counsel in those situations would be both unrealistic and inappropriate.[15] Of course, the

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[13]Such basic decisions include "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal . . . ." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). In these fundamental areas the defendant is not bound by his attorney's acts if he has not concurred in them.

[14]In the appellate context, this Court recently recognized this principle by holding that it is for counsel to decide which nonfrivolous claims should be pursued on direct appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). In *Barnes* the Court did not have occasion to decide whether counsel's *refusal* to raise a claim specifically *requested* by the appellant would constitute "cause" under *Wainwright v. Sykes*. *See Barnes*, 463 U.S. at 754 n.7. That question is likewise not before the Court in this case.

[15]In *Evitts v. Lucey*, ____U.S. ____, 105 S.Ct. 830, 837 (1985), this Court indicated that sanctions against the attorney rather than the defendant would be effective to protect the States' interest in enforcing their procedural default rules. In *Evitts*, however, the defense attorney was found to have provided ineffective assistance of counsel which had caused the defendant to forfeit his direct appeal.

purpose of enforcing procedural default rules is not to punish the defendant or his lawyer but to allow for the orderly and efficient administration of justice by the courts. *See Trent v. Commonwealth*, 155 Va. 1128, 1138, 156 S.E. 567, 570 (1931). *See also Harlow v. Commonwealth*, 195 Va. 269, 273, 77 S.E.2d 851, 853-854 (1953). These rules apply to the prosecution as well as the defendant. *See, e.g., Hart v. Commonwealth*, 221 Va. 283, 289-290, 269 S.E.2d 806, 810-811 (1980); *Rice v. Commonwealth*, 212 Va. 778, 188 S.E.2d 196 (1972).

Procedural rules regulating judicial proceedings are effective only if one presumes an identity of interest between lawyer and client. Such rules induce attorneys to vigorously investigate, carefully evaluate, and timely raise objections and issues. *See Arnold v. Wainwright*, 516 F.2d 964, 971 and n.12 (5th Cir. 1975), *cert. denied*, 426 U.S. 908 (1976). It would be anomalous to grant a habeas petitioner a federal forum for his claims virtually as a reward for the deficiencies of his defense at the state level. In a very real sense, however, this is what the Fourth Circuit approach would require.

Allowing mere attorney error to constitute "cause" would largely negate procedural rules by opening a breach through which almost any defaulting petitioner could pass. No longer would the state trial be the "main event," *see Sykes*, 433 U.S. at 91, but rather the focus would shift to collateral proceedings in federal court.

Other problems are also apparent. If, in order to secure federal enforcement of state procedural default rules, it must be established that defense counsel made a reasonable tactical decision not to raise a particular issue, prosecutors would be well advised and certainly motivated to oversee the acts and apparent omissions of defense counsel. Only by making detailed inquiries about, and a meticulous record of, defense tactics could the prosecutor in some measure protect the conviction. Because the defense may well choose

not to reveal its strategy as the case progresses, the prosecutor's task would be a difficult one at best. Ascertaining and establishing a record of defense counsel's motivations at the appellate level would be virtually impossible, except by presenting evidence at a subsequent habeas corpus proceeding.

Neither prosecutorial nor judicial supervision of defense counsel's performance is generally desirable from anyone's point of view. As the United States Court of Appeals for the District of Columbia Circuit has perceptively stated regarding "ineffectiveness of counsel" claims:

> For the law to encourage a wide-ranging inquiry, even after trial, into the conduct of defense counsel would undercut the fundamental premises of the trial process and transform its essential nature. The resulting upheaval in the role of the trial judge, widely recognized as a serious difficulty, would in itself call into question any broad doctrine of ineffective assistance. And the prosecution in a criminal case would in turn ask to oversee defense counsel's conduct at trial—to ensure against reversal.
>
> An even more difficult problem would be posed by the supervision of defense counsel's development of the case before trial. Even if we had the authority, it would be unwise to embark upon a doctrine that would open the door to a fundamental reordering of the adversary system into a system more inquisitorial in nature. The adversary system, warts and all, has worked to provide salutary protection for the rights of the accused. Efforts to improve the performance of defense counsel should not imperil that protection.

United States v. Decoster, 624 F.2d 196, 208-209 (D.C. Cir.) (en banc), *cert. denied*, 444 U.S. 944 (1979) (footnotes omitted). *See also Williams*, 425 U.S. at 512.

Adoption of the Fourth Circuit's rule would foster the very problems this Court hoped to avert in *Strickland:* "Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense." 104 S.Ct. at 2066. "The availability of intrusive post-trial inquiry into attorney performance . . . would encourage the proliferation of ineffectiveness challenges." *Id.* Also, "[i]ntensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Strickland,* 104 S.Ct. at 2066.

3. Courts will be unnecessarily burdened to the prejudice of all litigants if mere attorney error constitutes "cause."

Habeas corpus "shadow trials" of defense counsel's performance will proliferate under the standard adopted below. Every time an attorney has not objected at trial or raised an issue on appeal the defendant can assert in habeas corpus proceedings that it was the result of attorney error.[16] Fact-finding specifically focused upon counsel's motivations would be required to distinguish between tactical decisions and inadvertence, ignorance or negligence. If "cause" is established, a second hearing may be necessary to explore the merits of the defaulted claims. This will only exacerbate the already serious burden of litigation on the federal courts.

In balancing the utility of *expanding* the availability of federal habeas corpus review to state prisoners against the burden on the judicial system that such an expansion would

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[16]Prisoners "do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court." *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (Duniway, J., concurring).

create, it should be recognized that in the past twenty years there has been a staggering increase (nearly 700%) in filings of state prisoner habeas corpus petitions in federal court. *See* Bureau of Justice Statistics, Special Report, U.S. Dep't. of Justice, *Federal Review of State Prisoner Petitions—Habeas Corpus* at 1-2 (March, 1984) (hereinafter "*Special Report*").[17] Despite this flood of habeas petitions, the data show that only a very small number have resulted in dispositions favorable to the prisoners.[18] And it is not only the public and judiciary that suffer from the explosion of habeas corpus litigation. As the late Justice Jackson observed, "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown v. Allen*, 344 U.S. 443, 537 (1953). Judge Widener of the United States Court of Appeals for the Fourth Circuit has recently echoed that sentiment. He pointed out that "the barrage of suits filed by prisoners who flout the judicial system may in the end do the greatest harm to those prisoners having meritorious claims, which may be lost in the shuffle of the constantly growing fill of cases." Widener, *Fourth Circuit Review, Forward: The Impact of Judicial Decision-Making*, 37 Wash. & Lee L. Rev. 373, 374 (1980).

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[17]The statistics themselves do not reveal the full impact of the added case load. "Habeas corpus actions are somewhat different from other civil actions in that they may require the analysis of a complete court record." *Special Report* at 3 n.2. Furthermore, "[h]abeas corpus actions are also, by virtue of the prisoner status of the petitioners, less likely to be disposed of without court involvement." *Id.* at 3 n.2.

[18]For example, a United States Department of Justice study involving a sample of 1,899 state prisoner habeas petitions filed in federal court between July 1, 1975 and June 30, 1977 found that only 3.2% were granted in whole or in part, and a substantial portion of those did not result in release of the petitioner from custody. *Special Report* at 5.

See also Miller v. Bordenkircher, 764 F.2d 245, 248 (4th Cir. 1985) ("In this crowded courtscape, federal judges cannot be all things to all people.")

An already overburdened judicial system does not need a stimulus for additional habeas corpus hearings and litigation. But an acceptance of the Fourth Circuit's definition of "cause" would be just such a stimulus. Everyone would suffer from the resulting burden on the courts.

4. The holding below frustrates the interests of finality, comity, and federalism.

This Court has recognized that while "[t]he writ of habeas corpus indisputably holds an honored position in our jurisprudence," it also "entails significant costs." *Isaac*, 456 U.S. at 126 (footnote omitted). Those costs have been well articulated by the Court. By extending "the ordeal of trial for both society and the accused," collateral review of a criminal conviction "undermines the usual principles of finality of litigation." 456 U.S. at 127. *See also* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963). "Liberal allowance of the writ . . . degrades the prominence of the trial itself," and issuance of the writ "frequently cost[s] society the right to punish admitted offenders." *Isaac*, 456 U.S. at 127. Finally, because "[f]ederal intrusions into state criminal trials frustrate both the State's sovereign power to punish offenders and their good faith attempts to honor constitutional rights," the writ of habeas corpus "imposes special costs on our federal system." 456 U.S. at 128.

When a procedural default "has barred a prisoner from obtaining adjudication of his constitutional claim in the state courts," the costs exacted by allowing federal habeas review "are particularly high." *Isaac*, 456 U.S. at 128. This is so

because "the trial court has had no opportunity to correct the [alleged] defect . . . .," "[t]he defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum," *id.* (footnote omitted), "[*t*]*he state appellate courts have not had a chance to mend their own fences and avoid federal intrusion*," and issuance of the writ undercuts "*the State's ability to enforce its procedural rules*." 456 U.S. at 129 (emphasis added).

In *Sykes*, this Court established the "cause" and "prejudice" tests which a state prisoner who has procedurally defaulted in the state courts must satisfy before he can obtain federal habeas review of his claims. 433 U.S. at 87. Those tests were designed to minimize the costs exacted by the issuance of a writ of habeas corpus where the state courts have been denied the opportunity, by the prisoner's procedural default, to decide the merits of his claims. 433 U.S. at 88-90. The effect of the Fourth Circuit's ruling in the present case, however, is to dramatically lower the "cause" standard to a point where it is rendered meaningless. As Judge Hall perceptively observed in his dissent to the decision below: "Under the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under [*Sykes*]), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the [*Sykes*] bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule." (Pet. App. 20). By establishing a "cause" standard that practically any defaulting petitioner could meet, the decision of the court below necessarily frustrates the interests of finality, comity, and federalism that this Court has sought to foster and protect.

The "cause and prejudice" standard of *Wainwright v. Sykes* has done much to expedite habeas cases and advance

the interests it was designed to foster. The *Sykes* doctrine has resulted in the federal courts according needed respect to the States' reasonable procedural rules—in sharp contrast to the pre-*Sykes* days of *Fay v. Noia*, 372 U.S. 391 (1963). Under the sweeping rule of *Fay*, only one who "deliberately bypassed" the orderly procedure of the state courts forfeited his claim for federal review. 372 U.S. at 438. To find such a bypass, the state had to show that the habeas applicant "after consultation with competent counsel or otherwise, understandingly and knowingly" waived his claim by "'an intentional relinquishment or abandonment of a known right or privilege.'" *Fay*, 372 U.S. at 439, *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), as "the controlling standard."

Realistically, it is seldom possible for the state to meet such a standard. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 158 (1970). Thus, it comes as no surprise that the number of cases finding a deliberate bypass under the *Fay* test is quite small. The standard set by the Fourth Circuit in *Carrier*, like the standard of *Fay* amounts as a practical matter to a nearly total invalidation of state procedural default rules. *Sykes* was a great step in the right direction. The decision below, however, is a major step backwards.

II.

THE EXHAUSTION REQUIREMENT OF 28 U.S.C. § 2254 APPLIES TO CLAIMS OF ATTORNEY ERROR PROFFERED AS "CAUSE" FOR A PROCEDURAL DEFAULT, AND CARRIER HAS FAILED TO EXHAUST AVAILABLE STATE REMEDIES.

The Fourth Circuit held below that "[t]he exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims of habeas relief, not to the proffer of *Sykes* cause and

prejudice."[19] 724 F.2d at 402. (Pet. App. 14). The conclusion that the exhaustion requirement is inapplicable to a proffer of attorney error as *Sykes* "cause," if accepted by this Court, would have a significantly adverse effect upon federal-state comity and upon the workload of the federal courts. If a habeas petitioner complains about his attorney's performance based upon the attorney's ignorance or inadvertence, then he would have every incentive to simply label his claim as "mere attorney error" rather than "ineffective assistance of counsel," thereby proceeding directly to federal court without ever giving the state courts the opportunity to address the claim.[20] The net result would be a wholesale shift of ineffective counsel claims from the state to the federal courts. Such a result would not only increase the

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[19]Carrier's concession that if Virginia recognized attorney error short of ineffective assistance of counsel as cause for a procedural default, he would be required to exhaust state remedies (Br. Opp. 5, 14), while correct, is fundamentally at odds with this portion of the Fourth Circuit's ruling.

[20]It may be suggested that the decision whether to proceed directly into federal court with an allegation of mere attorney error or to exhaust a possible claim of ineffective assistance of counsel in the state courts should be left to the habeas petitioner. Such a petitioner might argue that it is his right to run the risk, if he so chooses, that by electing not to exhaust his ineffective assistance of counsel claim he may be precluded from raising such a claim in a subsequent federal habeas petition. *See Rose v. Lundy*, 455 U.S. at 520-521. It is difficult to see, however, what risk, if any, a petitioner would run by choosing to proceed directly to federal court with his allegation of mere attorney error. If he is unable to establish that his attorney committed mere error, it is highly unlikely, if not impossible, that in subsequent proceedings he would be able to establish that his attorney's performance fell below the level required by the Sixth Amendment.

number of federal habeas petitions alleging attorney error,[21] but would also undermine the principles of federalism and comity which form the basis of the exhaustion requirement. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Picard v. Conner*, 404 U.S. 270, 275 (1971).

In *Alcorn v. Smith*, 724 F.2d 37 (6th Cir. 1983),[22] the United States Court of Appeals for the Sixth Circuit reasoned that when a federal habeas petitioner had exhausted his substantive claim, but had never presented to the state courts "the substance of his claim that his procedural default should be excused . . . because his counsel was inadequate," the petition must be dismissed for failure to exhaust state remedies. 724 F.2d at 41. The Court of Appeals concluded that the "[c]onsiderations of federalism" which form the basis for the exhaustion requirement permitted no exception to the requirement simply because the claim of attorney error was asserted as *Sykes* "cause" rather than as an independent claim for relief. *Id. See also United States ex rel. Winters v. DeRobertis*, 568 F. Supp. 1484, 1489 (N.D. Ill. 1983).

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[21]Undoubtedly, a number of state prisoners never bring their claims of attorney error to federal court. They either obtain relief in the state courts or they are convinced by the state courts' rejection of their claims that the claims are without merit. Under the *Carrier* rationale, however, so long as the basis for the claim of attorney error is ignorance or inadvertence, a state prisoner would no longer have any reason to bother presenting his claim to the state courts.

[22]This Court granted certiorari in *Alcorn*, 105 S.Ct. 1353, but the judgment of the Sixth Circuit was summarily vacated when the Commonwealth of Kentucky informed this Court that it had been discovered that Alcorn had, in fact, exhausted his claim of attorney error. 105 S.Ct. at 2315.

This Court should not permit the exhaustion requirement to be circumvented merely because a federal habeas petitioner has changed the label on his claim of attorney error. When a claim of ineffective assistance of counsel has never been presented to the state courts, a federal court is not free to grant relief even if it believes that there was a clear constitutional violation. *Duckworth v. Serrano*, 454 U.S. 1 (1981). "[O]bvious constitutional errors, *no less than obscure transgressions*, are subject to the [exhaustion] requirements of § 2254(b) . . . ." 454 U.S. at 4 (emphasis added).

Thus, whether a habeas petitioner alleges a clear-cut violation of the Sixth Amendment, or merely an "obscure transgression" proffered as cause for a procedural default, the state courts must be afforded the first opportunity to address the claim. Such a conclusion is also required by this Court's holding in *Rose v. Lundy* that a federal habeas petition containing *any* unexhausted claim must be dismissed. 455 U.S. at 522. A contrary conclusion, such as that reached by the Fourth Circuit in the present case, would allow a federal court to indirectly address matters which the court could not directly address under *Rose v. Lundy*. *See Winters*, 568 F. Supp. at 1489.

While Carrier has exhausted available state remedies as to his substantive discovery claim by raising it in his state habeas corpus petition and in his subsequent appeal to the Virginia Supreme Court, the Fourth Circuit correctly recognized that a merits review is barred by *Sykes* unless Carrier can show cause and prejudice for his procedural default on direct appeal. *See* 724 F.2d at 399. (Pet. App. 8). Carrier has belatedly asserted that attorney error was the cause of his procedural default. At no time in the courts of Virginia, however, did Carrier ever make such an assertion, even after the state's motion to dismiss put him on notice

that in the absence of an explanation for his default, his claim would be procedurally barred. The first time that Carrier ever made a proffer of cause for his default was in his "Motion of Objection and Exception" to the report of the United States Magistrate which had recommended dismissal of his federal habeas petition. (J.A. 10-11).

A federal habeas corpus petitioner must first exhaust available state remedies before relief can be granted. 28 U.S.C. § 2254(b). The statutory exhaustion requirement codifies the common law. *Rose v. Lundy*, 455 U.S. at 515, *citing Ex parte Royall*, 117 U.S. 241, 251 (1886). A petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).[23]

In *Slayton v. Parrigan*, 215 Va. 27, 205 S.E. 2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), the Supreme Court of Virginia stated that "absent a showing of ineffective assistance of counsel," a non-jurisdictional claim cannot be raised for the first time in a habeas corpus proceeding. 215 Va. at 29, 205 S.E. 2d at 682. If in the present case this Court adopts the position that, in order to constitute "cause" under *Sykes*, the alleged attorney error must rise to the level of ineffective assistance of counsel in violation of the Sixth Amendment, Carrier will clearly have an available state remedy. Indeed, Carrier has conceded in this Court that if attorney error short of ineffective assistance of counsel cannot constitute "cause," he "must return to state court."

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[23]The Fourth Circuit concluded that "since this is not an exhaustion of remedies case, we need not inquire whether any state remedies remain available to Carrier or whether further state proceedings would be futile due to the operation of Virginia law." 724 F.2d at 402 n.8. (Pet. App. 14 n.8).

(Br. Opp. 4). This is so because under Virginia law ineffective assistance of counsel is cause for a procedural default.

If, however, this Court were to accept the Fourth Circuit's conclusion that attorney error short of ineffective assistance of counsel can constitute "cause" under *Sykes*,[24] Carrier would nevertheless have an available state remedy to exhaust. In *Parrigan*, the Virginia Supreme Court recognized that attorney error of sufficient magnitude can excuse a procedural default. 215 Va. at 29, 205 S.E.2d at 682. Although Carrier now insists that for purposes of his proffer of *Sykes* "cause" he is not alleging a Sixth Amendment violation, he has asserted in this Court that his appellate attorney abandoned a "winning . . . argument" (Br. Opp. 6), and that his claim of attorney error may well rise to the level of ineffective assistance of counsel (Br. Opp. 4). When he first raised his claim of attorney error in federal district court he described it as a claim of "ineffective assistance of counsel." (J.A. 11). In his brief filed in the Fourth Circuit he alleged ineffective assistance of counsel, both as *Sykes* "cause" and as an independent Sixth Amendment violation. (Pet. App. 23-25). The Fourth Circuit described counsel's failure to raise the discovery claim on appeal as "inexplicabl[e]" and said that "the likelihood of attorney error appears very great in this case." (Pet. App. 5, 14-15). Under these circumstances, the Virginia courts should be afforded the opportunity to determine, in the first instance, whether Carrier's claim of attorney error, labeled in whatever manner Carrier may choose, is sufficient under Virginia law to excuse his procedural default.

Carrier cannot successfully contend that he has exhausted state remedies by virtue of his prior state habeas

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[24]For the reasons previously stated in Argument I, the Petitioner strenuously urges the Court not to so rule.

proceedings.[25] In order to satisfy the requirement of 28 U.S.C. § 2254, Carrier must have afforded the state courts "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claims." *Anderson v. Harless*, 459 U.S. 4, 6 (1982), *quoting Picard v. Conner*, 404 U.S. 270, 276-277 (1971). He also "must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim." *Id.* Since Carrier cannot obtain

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[25]Carrier has correctly conceded that if the Virginia courts were to recognize mere attorney error as cause for a procedural default, "there would be a failure to exhaust in this case." (Br. Opp. 14). Although § 8.01-654(B)(2) of the Virginia Code (J.A. 17) provides generally that "[n]o writ [of habeas corpus] shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition," this would not render a return to the state courts futile. Even if, *arguendo*, Carrier knew at the time he filed his *pro se* state habeas corpus petition that his attorney had failed to raise the discovery claim on direct appeal, it is entirely possible that the Virginia courts would not interpret § 8.01-654(B) (2) so as to bar relief. Carrier has asserted that he never alleged attorney error in the state courts as the cause for his procedural default on direct appeal because such a claim could not satisfy the "farce and mockery" test then being applied in Virginia. (Br. Opp. 14). *See Slayton v. Weinberger*, 213 Va. 690, 691, 194 S.E.2d 703, 705 (1973). That, however, is no longer the standard in Virginia. In *Stokes v. Warden*, 226 Va. 111, 306 S.E.2d 882 (1983), the Virginia Supreme Court formally adopted and applied a "reasonably effective assistance" test. Since then, this Court has decided *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052 (1984), and the Virginia Supreme Court has consistently applied the *Strickland* standard. *See Virginia Department of Corrections v. Clark*, 227 Va. 525, 318 S.E.2d 399 (1984); *Director of the Department of Corrections v. Jones*, ____Va. ____, 329 S.E.2d 33 (1985). In view of this change in the applicable standard, and the fact that Carrier filed his state habeas petition *pro se*, if Carrier were required to return to the state forum, the Commonwealth would not assert § 8.01-654(B)(2) as a defense and it is quite possible that the Virginia courts would not apply the statute to bar habeas relief.

federal habeas review of the merits of his discovery claim unless he is able to establish "cause" for his procedural default in the state courts, his assertion of attorney error is a *sine qua non* of his claim for relief. Having never presented his claim of attorney error to the state courts in any form, Carrier has failed to present to those courts the "substance" of his claim for relief, and has thereby failed to satisfy the exhaustion requirement.

CONCLUSION

That mere attorney error does not constitute "cause" under *Wainwright v. Sykes* is compelled not only by prior decisions of this Court but by sound reason. Practically any non-tactical failure to raise an issue can, with benefit of hindsight, be called attorney error. Acceptance of such a standard would allow the exception to swallow the rule.

The *Sykes* doctrine has been very effective in advancing the orderly and efficient administration of justice, the finality of convictions, and the interests of comity and federalism, as it was intended to do. At the same time, however, criminal defendants have been protected from miscarriages of justice resulting from serious attorney mistakes by the Sixth Amendment right to effective assistance of counsel, as articulated in *Strickland v. Washington*. This workable and effective balance would cease if mere attorney error constitutes "cause" under *Sykes*. Indeed, the *Sykes* standard would be eviscerated.

Additionally, Carrier's claims before the Court of Appeals concerning attorney error were never presented to, or considered by, the Virginia courts. Considerations of comity and federalism require that state remedies be exhausted and that the state courts be given the opportunity to decide whether the alleged attorney error rises to the level necessary for the state courts to excuse Carrier's procedural default.

Accordingly, the judgment of the Court of Appeals below was erroneous and must be reversed.

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No. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

I. Whether 28 U.S.C. § 2254 requires a *pro se* state prisoner to present *Wainwright* v. *Sykes* "cause and prejudice," the threshold requirement for federal court review, first to the state court as a prerequisite to federal court consideration.

II. Where a constitutional claim is raised by a contemporaneous objection at trial, listed in the Notice of Appeal, and yet is not pursued on direct appeal, whether the district court should hold an evidentiary hearing to determine whether the attorney's conduct was inadvertent and hence "cause" under *Wainwright* v. *Sykes*.

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OPINIONS BELOW

A panel of the United States Court of Appeals for the Fourth Circuit reversed the district court's opinion and remanded this case for an evidentiary hearing. The panel opinion is reported at 724 F.2d 396 (4th Cir. 1983).

Sitting en banc, the United States Court of Appeals for the Fourth Circuit adopted the decision of the panel. The en banc opinion is reported at 754 F.2d 520 (4th Cir. 1985) (en banc).

JURISDICTION

The judgment of the panel was entered on December 27, 1983. (Pet. App. 3).[1] The en banc opinion, adopting the panel opinion, was entered on February 7, 1985. (Pet. App. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

28 U.S.C. § 2254 provides, in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

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[1] References to the Commonwealth's Appendix to its Petition for Writ of Certiorari are cited (Pet. App.). References to the Joint Appendix are cited (J.A.). The Record of Appeal is in three volumes. References to Volume I are cited to the appropriate tab, e.g. (R. I at tab 2). References to Volume II are cited to the pertinent page, e.g. (R. II at 25).

> State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Virginia Code § 8.01-654 is reproduced at App. 17-18 of the Joint Appendix.

Rule 5:21 of the Rules of the Supreme Court of Virginia, at the time of Carrier's trial and direct appeal,[2] provided:

> The petition for appeal shall contain assignments of error and the form, contents and length of the petition for appeal shall conform in all respects to the requirements of the appellant's opening brief. Error will not be sustained to any ruling below unless objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below. An assignment of error which merely states that the

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[2] The substance of former Rule 5:21 is now contained in Rules 5:17(c) and 5:25, which appear *infra*, at nn.4-5.

judgment is contrary to the law and the evidence is not sufficient.

STATEMENT OF THE CASE

Clifford Carrier, the respondent, is an inmate in the Virginia state penal system, currently serving a forty-five year sentence for rape and abduction. He was convicted in 1977 following a jury trial in the Circuit Court of the City of Virginia Beach, Virginia.

Prior to trial, defense counsel moved to discover all:

> statements of the victim, which specifically outlines [sic] the descriptions that she provided to the Virginia Beach Police Department, or any member of the State Police Department of her assailants, the vehicle the assailants were driving, and the location of where the alleged rape took place.

(R. II at 11). The judge examined the statements *in camera* and denied the request, finding that the statements contained "no evidence of an *exculpatory* nature." (R. II at 31) (emphasis added). Immediately before trial, defense counsel again requested the victim's statements. Following an *in camera* examination, the court denied the request stating: "[T]he court . . . is of the opinion that nothing therein is of an exculpatory nature which should be properly . . . disclosed to the defendant." (Tr. Transcript at 151). The court ordered the statements sealed. Defense counsel objected. (Tr. Transcript at 151-52).

After Carrier's conviction, defense counsel filed a Notice of Appeal to the Virginia Supreme Court, assigning seven errors including:

> Did the trial Judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial, and during the course of the trial?

(R. II at 83). Without consulting with his client (J.A. 10), counsel filed an appellate brief, denominated under Virginia practice as a petition for appeal, that failed to address this discovery claim. (R. I at tab 8). The Virginia Supreme Court refused the appeal on April 27, 1978. (J.A. 4). This Court denied certiorari on January 8, 1979. *Carrier* v. *Virginia*, 439 U.S. 1076 (1979).

In February of 1980, Carrier filed a *pro se* state habeas corpus petition alleging that the withholding of the victim's statements denied him due process. (R. I at tab 3). The Commonwealth of Virginia moved to dismiss his petition on the ground that, "although he appealed his convictions to the Virginia Supreme Court, he failed to present any of the allegations he now makes." (R. I at tab 3). Carrier then filed a "Motion for Appointment of Counsel and Rebuttal," stating:

> Petitioner contends that he should not be made to document all his claims without benifit [sic] of counsel, and request that counsel be appointed so that he may produce a more colorable claim in this court. Also, that his constitutional rights may further be protected.

(J.A. 5). Without appointing him counsel, the circuit court dismissed Carrier's habeas petition "for the reasons stated in the Motion to Dismiss." The Virginia Supreme Court affirmed the circuit court's decision on June 12, 1980. (J.A. 7).

Carrier, again proceeding *pro se*, petitioned the United States District Court for the Eastern District of Virginia for a writ of habeas corpus. Carrier's only claim was the denial of due process on the discovery matter:

> The Prosecution deliberately witheld [sic] Statement made by the prosecutrix from Petitioners attorney. Petitioners attorney filed a request for dis-

> covery with the trial court Judge and the request was denied by the Judge.
>
> 'Petitioner was denied the Right to Discovery.'
>
> Petitioner contends that the statement would have been favorable to his defense and was deliberately withheld and suppressed by the Prosecution. Therefore Petitioner was denied the right to a fair trial.

(R. I at tab 2). The Commonwealth filed a Motion To Dismiss on the ground that Carrier's failure to pursue the issue on direct appeal barred collateral attack in federal court and that Carrier failed to exhaust state remedies. (R. I at tab 3). The Commonwealth suggested that Carrier, in order to exhaust state remedies, file a second petition for a writ of habeas corpus in the state courts and explain why the discovery issue was not raised on direct appeal. In the alternative, the Commonwealth suggested that Carrier return to the state habeas court to raise the substantive issue of ineffective assistance of counsel. (R. I at tab 3). Although Carrier asked the district court to appoint counsel to represent him (R. I at tab 9), he was required to proceed *pro se*.

The case was referred to a United States Magistrate who recommended dismissal because of procedural default under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). The magistrate also ruled that Carrier had not exhausted his state remedies, upon a reading of Va. S. Ct. Rule 5:21 that Carrier could have received relief in a Virginia habeas proceeding if he had shown "justifiable cause" such as "incompetency of counsel" for his procedural default. (R. I at tab 13).

Carrier replied to the magistrate's report with a "Motion of Objection and Exception," arguing that the failure to raise the discovery issue on direct appeal "was

not due to any fault of his" but "was the results of eneffective [sic] assistance of counsel." (J.A. 10). He further stated that he was "not allowed by his then court appointed attorney to fully take part in the preparation of his appeal." (J.A. 10). Carrier requested an evidentiary hearing to prove the truth of his allegations. (J.A. 10).

The district court adopted the magistrate's recommendation and dismissed Carrier's petition on the basis of procedural default. The district court refused to consider the "cause" proffered by Carrier on the ground that Carrier had failed to exhaust this "cause" issue in the Virginia courts. (Pet. App. 28).

Carrier appealed to the United States Court of Appeals for the Fourth Circuit. There, for the first time on collateral review, he was appointed counsel. On December 27, 1983, a panel of the court reversed the district court's order. *Carrier* v. *Hutto*, 724 F.2d 396 (4th Cir. 1983). (Pet. App. 3). In doing so, the court of appeals held that "[t]he exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not the proffer of *Wainwright* cause and prejudice," 724 F.2d at 402, and that "attorney error short of wholesale ineffectiveness of counsel can constitute *Wainwright* cause, provided that the act or omission resulting in procedural default emanated from ignorance or inadvertence, rather than deliberate strategy." *Id.* at 401. The court remanded the matter to the district court for an evidentiary hearing to determine "whether counsel's failure to appeal the *Brady* issue was in fact attorney error or whether it was simply unsuccessful appellate strategy." *Id.* at 403. On remand, the district court was also to determine whether Carrier had been prejudiced. *Id.*

On February 7, 1985, the Fourth Circuit, in an en banc per curiam opinion, adopted the panel's majority opinion.

Carrier v. *Hutto*, 754 F.2d 520 (4th Cir. 1985) (en banc). (Pet. App. 1). The four dissenting judges adopted the panel's dissent.

This Court granted certiorari on July 1, 1985.

SUMMARY OF ARGUMENT

I. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), holds that a federal habeas court should not consider an issue which is barred by a state procedural default. *Sykes* provides an exception where there is "cause" and "prejudice." As this is a prudential threshold to review in federal court, there is no need to first exhaust this issue before a state court.

If there is a requirement that this issue be presented to a state court, that requirement does not apply to this case. Rule 5:21 of the Virginia Supreme Court Rules then in effect provided no remedy for a procedural default that occurred on appeal as distinguished from one that occurred at trial. The procedural default relied upon by the Commonwealth in this case was the failure to raise an issue in an appellate brief that had been raised through a contemporaneous objection at trial and preserved in the Notice of Appeal.

Moreover, at the state habeas level, Carrier raised the constitutional claim that underlies the instant case and sought counsel to aid him in presenting that claim in a proper manner. No counsel was appointed. In this circumstance Carrier did all that can be reasonably required to present the issue to the state habeas court.

II. The constitutional claim underlying the instant case was raised through a contemporaneous objection at trial. The procedural default occurred on appeal. On this record it is unknown whether that default was by inadvertence of counsel or the result of strategic decision. The

Fourth Circuit correctly remanded this case to the district court for a hearing on that issue.

This case is different from *Sykes* where the procedural default was at trial. The reasoning of *Sykes* and the values to which it referred are concerned solely with trial procedural defaults. *Sykes* itself preserved for another day consideration of defaults that did not occur at trial and were not strategic in nature.

This case presents the issue left open in *Jones* v. *Barnes*, 463 U.S. 745 (1983), namely whether counsel's failure to raise on appeal claims preserved at trial would constitute *Sykes* cause. That issue should be decided only upon an adequate record. The Fourth Circuit correctly remanded this case for an evidentiary hearing at which an adequate record could be prepared.

ARGUMENT

I. 28 U.S.C. § 2254 DOES NOT REQUIRE A *PRO SE* STATE PRISONER TO PRESENT *WAINWRIGHT* V. *SYKES* "CAUSE AND PREJUDICE," THE THRESHOLD REQUIREMENT FOR FEDERAL COURT REVIEW, FIRST TO THE STATE COURT AS A PREREQUISITE TO FEDERAL COURT CONSIDERATION.

The Commonwealth here argues that, before a federal court may consider whether a habeas petitioner has "cause" to overcome the procedural default bar of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the issue of "cause" must first be presented to the state court. This is an argument that a federal court may not consider an issue going to its own review threshold without first receiving guidance from a state court. However, *Sykes* "cause" does not go to the constitutional issue that forms the merits of a habeas petition; rather, it is this Court's self-imposed

prerequisite for federal review once a state court has imposed a procedural bar. We respectfully submit that the position urged by the Commonwealth has never been the law and should not become the law through this case.

A. *Sykes* "Cause" Is An Entry Standard For Federal Habeas Courts And Does Not Raise An Exhaustion Issue Under 28 U.S.C. § 2254.

The Fourth Circuit correctly decided that this case does not present an exhaustion issue. 724 F.2d 396, 402 & n.8 (1983). "The exhaustion requirement of 28 U.S.C. § 2254 pertains to independent claims for habeas relief, not to the proffer of *Wainwright* cause and prejudice." *Id.* at 402.

In contesting this holding, the Commonwealth misconstrues *Sykes*. Because the defense counsel in *Sykes* did not object at trial to the admission of the defendant's confession, Florida, invoking its contemporaneous objection rule, refused to consider in a habeas proceeding the admissibility of the confession. *Sykes*, 433 U.S. at 75, 85-86. The only issue in *Sykes* was "the adequacy of state grounds to bar federal habeas corpus review." *Id.* at 81. Indeed, this Court found that exhaustion of state remedies was not an issue. *Id.* at 80-81.

In deciding *Sykes*, this Court held that the Florida contemporaneous objection rule was "an independent and adequate state procedural ground," which normally would bar federal habeas review of the procedurally waived issue. *Id.* at 86-87. This Court held further that this general rule would "not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim" if the habeas petitioner could show "cause" for not complying with a state procedural rule and "prejudice" resulting from the application of such a rule. *Id.* at 91. This "cause and prejudice" exception, it should

be emphasized, would allow a federal court, in the interests of justice, to review a state petitioner's constitutional claim "for the first time." *Id.* at 90-91.

Five years later, in *Engle* v. *Isaac*, 456 U.S. 107 (1982), this Court reaffirmed *Sykes*' treatment of exhaustion. This Court found that *Engle*, like *Sykes*, was not an exhaustion case. 456 U.S. at 125 n.28. In *Engle*, Ohio invoked its contemporaneous objection rule to bar appellate consideration of respondents' due process argument regarding jury instructions at trial. *Id.* at 125. This Court stated the issue before it as folllows: "We must determine, therefore, whether respondents may litigate, in a federal habeas proceeding, *a constitutional claim* that they forfeited before the state courts." *Id.* (footnote omitted) (emphasis added). The Court then focused directly upon whether there was *Sykes* "cause" to avoid the state procedural bar, *id.* at 130-34, even though that issue had not been presented to the Ohio courts. *Id.* at 113-16, 122-25. Exhaustion of *Sykes* "cause" was not required.

The *Sykes* and *Engle* approach to exhaustion is consistent with the plain language of the exhaustion requirement in 28 U.S.C. § 2254.[3] Section 2254(b)-(c) provides that before a state prisoner may apply for federal habeas, he must have "exhausted the remedies available in the courts of the State. . . ." The statute goes on to make

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[3] In addition, nothing in the legislative history of this provision suggests otherwise. When Congress added section 2254 in 1947, the House Report on the entire bill merely stated: "This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S.Ct. 448, 321, [sic] U.S. 114, 88 L. Ed. 572.)." H.R. Rep. No. 308, 80th Cong., 1st Sess. A180 (1947). The "existing law" to which Congress referred, of course, only required that a federal habeas petitioner first exhaust his *constitutional* claims in state court.

explicit that a petitioner "shall not be deemed to have exhausted" state remedies "if he has the right under the law of the State to raise, by any available procedure, *the question presented.*" (emphasis added). "The question presented" in the petition, of course, is the constitutional claim that forms the substance of his asserted right to relief. This is quite different from a threshold requirement of cause by which he can gain substantive review by a federal court.

Carrier, it should be noted, in fact presented his constitutional claim to the state habeas court. (R. I at tab 8). He therefore fulfilled the exhaustion requirement of section 2254(b)-(c). As in *Sykes* and *Engle*, no more is required.

B. Even If *Sykes* "Cause" Must Be Exhausted In State Court, Carrier Has Already Exhausted His Virginia Remedies.

Assuming, *arguendo*, that section 2254(b)-(c) exhaustion is required as to *Sykes* "cause," Carrier met that requirement in this case. We shall demonstrate that Virginia provided no procedure in which to raise *Sykes* "cause"; that whatever procedure Virginia provided, Carrier followed to no avail; and that there is no further practicable procedure still available to him.

It should be recalled that the procedural default that is relevant here occurred on appeal and not at trial. This is *not* a case of failure to make a contemporaneous trial objection. This factor renders whatever relief may have otherwise been available in the Virginia courts irrelevant here.

As the Commonwealth points out to this Court (Pet. Brief at 4 n.4), under Virginia law a petitioner may raise on state habeas only those issues which meet the require-

ment of Virginia Supreme Court Rule 5:21. At the time Carrier filed his state habeas petition, Rule 5:21 provided:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. Only errors assigned in the petition for appeal will be noticed by this Court and no error not so assigned will be admitted as a ground for reversal of a decision below.

Va. S. Ct. R. 5:21. As the Commonwealth points out (Pet. Brief at 2), Rule 5:21 provides a "good cause" and an "ends of justice" exception to its procedural default rule. It is clear, however, that this exception applies only to the failure to object *at trial*. There is no such exception for procedural default *on appeal*, and the Commonwealth points to no authority that states otherwise. *Slayton* v. *Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), to which the Commonwealth does refer (Pet. Brief at 27-28), is of no assistance. *Slayton* concerned the failure to make a contemporaneous objection *at trial*. Of course, the "good cause" and "ends of justice" exception to Rule 5:21 apply to procedural defaults at trial. *Slayton* had no occasion to consider the effect of Rule 5:21 on a procedural default on appeal—which is the case here—for the explicit language of Rule 5:21 provided otherwise.

That Virginia has not inadvertently made this differentiation between procedural defects at trial and those on appeal can be seen from the August 1, 1985, revisions of the Virginia Supreme Court Rules, to which the Commonwealth draws this Court's attention. (Pet. Brief at 2 n.3). The Commonwealth advises this Court that the 1985 revision made no change in substance from the preceding

rule. In the current rule, the subject of review of errors at trial was placed into Rule 5:25.[4] The provision of procedural default on appeal was placed into 5:17(c).[5] Only Rule 5:25 of the revised rules contains the "good cause" and "ends of justice" exception.

Even if *Slayton* can be read out of its context to furnish instruction for appellate procedural defaults, it does not aid the Commonwealth's position. At most, *Slayton* can be construed as equating "good cause" in Rule 5:21 to "ineffective assistance of counsel." *Slayton* concerned a failure to make a contemporaneous trial objection that an in-court identification of the defendant was tainted by an impermissibly suggestive pre-trial identification. Parrigan, the petitioner, for the first time on state habeas contended the identification was a denial of his constitutional rights. Moreover, he contended that he had been denied the effective assistance of counsel at trial. The Virginia trial court, after an evidentiary hearing, ruled that Parrigan's counsel was not ineffective but held for Parrigan on the identification issue. On appeal, the sole issue considered was whether the failure of Parrigan's trial counsel to object to the in-court identification at trial

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[4] Rule 5:25, in pertinent part, now provides: "Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice." Va. S.Ct. R. 5:25 (1985).

[5] Rule 5:17(c), in pertinent part, now provides: "The provsions of Rule 5:25 shall apply to limit the questions upon which this court will rule on appeal. Only errors assigned in the petition for appeal will be noticed by this Court." Va. S.Ct. R. 5:17(c) (1985). The Rule contains a similar provision for appeals from the Court of Appeals, *id.*, the intermediate appellate courts established effective January 1, 1985. Va. Code § 17-116.01 (Supp. 1985).

barred the issue on state habeas. Reversing the trial court's issuance of a writ of habeas corpus, the Virginia Supreme Court, apparently applying but without citing Rule 5:21, stated:

> [T]he court below erred, absent a showing of ineffective assistance of counsel in failing to raise that question, in permitting inquiry on this question for the first time in the habeas corpus proceeding.

215 Va. at 29, 205 S.E.2d at 682. Thus, if *Slayton* speaks at all to the issue here, it says that "good cause" under Rule 5:21 meant "ineffective assistance of counsel"—which is a separate and independent constitutional claim. Carrier asserts no such claim before this Court.

It bears repetition that the "good cause" exception in Rule 5:21, now Rule 5:25—whatever it may mean—applies only to procedural defaults at trial. There is no such exception to a procedural default on appeal—which is this case. Thus, even if section 2254(b)-(c) exhaustion is applicable to *Sykes* "cause," there is no remedy available in Virginia procedure by which the issue can be raised and pursued.

Moreover, if Virginia provided a procedure to raise *Sykes* "cause," Carrier made every reasonable effort to exhaust that procedure. In 1979, Carrier filed a state habeas petition *pro se*. In that petition, he asked the Virginia courts to consider the due process discovery issue which his trial attorney had raised at trial. Carrier asked the Virginia circuit court to appoint counsel to help him: "Petitioner contends that he should not be made to document all his claims without benifit [sic] of counsel, and request [sic] that counsel be appointed so that he may produce a more colorable claim in this court." (J.A. 6). The state court did not appoint counsel for Carrier, nor did the court conduct an evidentiary hearing. Rather, the court dismissed the petition. (R. I at tab 12).

We respectfully submit that Carrier could have done no more. To expect a lay person to understand the intricacies of *Sykes* "cause," as a threshold condition to federal court entry, and to present that "cause" in a *pro se* habeas petition in state court is unrealistic. Carrier asked for the assistance of counsel in order to present his petition in a proper manner. (J.A. 5-6). Presumably, counsel would have seen that all of the threshold requirements that might have stood in the way of the consideration of the substantive constitutional claim that Carrier did in fact raise were met.

In the alternative, the state habeas court could have requested an affidavit from the trial counsel. This affidavit could have resolved the "cause" issue, or at least shown whether a more expansive evidentiary hearing was necessary. While the Commonwealth asserts that its courts must rule on *Sykes* "cause" before any federal consideration, here its courts did nothing to explore whether Carrier had a *Sykes* claim. The Commonwealth should not be allowed to have it both ways. Either state courts must make some minimal effort to allow a *pro se* petitioner to contest a state procedural bar, or states such as Virginia, whose courts dismiss without inquiry, cannot later complain of a subsequent federal examination of *Sykes* "cause."[6]

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[6] In *Townsend* v. *Sain*, 372 U.S. 293 (1963), this Court explained the circumstances under which a federal district court must grant a habeas petitioner an evidentiary hearing. In *Townsend*, the Court held that in considering a petition which alleges facts that, if true, warrant relief, a federal court has the power to hold an evidentiary hearing. *Id.* at 312. The Court further held that under some circumstances a district court is absolutely required to exercise this power: "Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not

Thus, Virginia courts were presented with ample opportunity to consider any reason not to apply the procedural bar of their Rule 5:21. As Carrier did all he could, no more should be required.

Finally, the Commonwealth suggests that Carrier may still have a habeas remedy in its courts. (Pet. Brief at 29 n.25). With commendable candor, the Commonwealth acknowledges that Virginia law bars successive habeas petitions (Pet. Brief at 29 n.25): "No writ shall be granted on the basis of any allegation the fact of which the petitioner had knowledge at the time of filing any previous petition." Va. Code § 8.01-654(B)(2) (J.A. 17-18). Nonetheless, the Commonwealth proffers to this Court that, should Carrier again petition for state habeas, the Commonwealth would not rely upon this statutory bar. (Pet. Brief at 29 n.25). However, the Commonwealth also points out the obvious: there is no assurance that the Virginia courts would be inclined to ignore a statutory bar solely because the Commonwealth fails to raise it. We respectfully submit that if this is the best the Commonwealth can offer, it illustrates the chimerial nature of any state remedy.

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receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding." *Id.* at 312.

Because the Virginia courts did not give Carrier any evidentiary hearing before declaring a procedural default, the Fourth Circuit correctly ordered the district court on remand to conduct a hearing.

II. WHERE A CONSTITUTIONAL CLAIM IS RAISED BY A CONTEMPORANEOUS OBJECTION AT TRIAL, LISTED IN THE NOTICE OF APPEAL, AND YET IS NOT PURSUED ON DIRECT APPEAL, THE DISTRICT COURT SHOULD HOLD AN EVIDENTIARY HEARING TO DETERMINE WHETHER THE ATTORNEY'S CONDUCT WAS INADVERTENT, AND HENCE "CAUSE" UNDER *WAINWRIGHT* V. *SYKES*.

This case presents the issue posed but not answered in *Jones* v. *Barnes*, 463 U.S. 745, 754 n.7 (1983): "whether counsel's refusal to raise [on appeal] requested claims would constitute 'cause' for a petitioner's default within the meaning of *Wainwright* v. *Sykes*." The answer was given by Justice Blackmun: "[C]ounsel's failure to raise on appeal nonfrivolous constitutional claims upon which his client has insisted must constitute 'cause and prejudice' for any resulting procedural default under state law." *Jones*, 463 U.S. at 755 (Blackmun, J., concurring).

The only distinction between *Jones* v. *Barnes* and the instant case is that there is no showing on this record that Carrier insisted that the discovery issue by raised on appeal. It bears emphasis that the court of appeals did no more in this case than to remand it for an evidentiary hearing at which a record could be developed.

In *Sykes*, this Court held that an attorney's failure to make a timely objection at trial under the state's contemporaneous objection rule barred federal habeas review, absent a showing of "cause" and "prejudice." 433 U.S. at 86-87. In reaching its conclusion, this Court focused at

length on the value of the contemporaneous objection rule both at trial and to a later habeas proceeding. Thus, this Court was concerned with 1) making the criminal trial the "main event" in the adjudication of guilt or innocence, *id.* at 90; 2) preserving the efficiencies inherent in the contemporaneous objection rule, which may lead to a ruling sustaining the objection, *id.* at 88; 3) permitting the prosecution to reassess its position while there is still time to act upon that reassessment, *id.* at 89; 4) perfecting a record that would be of aid on direct appeal and in any subsequent habeas proceeding, *id.* at 88-89; and 5) discouraging "sandbagging" by defense counsel. *Id.* at 89. None of these values is implicated in the instant case.

Here, defense counsel made a contemporaneous objection. The trial court considered the matter fully and whatever record was appropriate to the objection was developed. There was no "sandbagging" at trial.[7] The procedural default occurred only after defense counsel raised the issue in his Notice of Appeal and then inexplicably failed to include it in his petition for appeal to the Virginia Supreme Court.[8]

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[7] This Court made it clear in *Sykes* that it rejected the "sweeping" rule in *Fay* v. *Noia*, 372 U.S. 391 (1963), only to the extent that *Fay* had been applied far beyond the appellate context in which it had been fashioned to also cover "failures to raise individual substantive objections in the state trial." 433 U.S. at 87-88 n.12. This Court added, "We have no occasion today to consider the *Fay* rule as applied to the facts there confronting the Court." *Sykes*, 433 U.S. at 88 n.12. The *Sykes*' Court's focus, therefore, was on cases in which there was no contemporaneous objection at trial.

[8] In his dissenting opinion, Judge Hall posits for the first time that counsel did not properly preserve the claim of error at trial. *Carrier*, 724 F.2d at 403-04 (Hall, J., dissenting). That issue, however, was not raised in the Petition for Certiorari and thus is not before this Court.

Appeal, of course, is quite different from trial. Unlike the hectic pace of trial, the appellate process affords the attorney time for reflection, research, and full consultation with his client. Moreover, it can be stated without fear of contradiction from any experienced advocate that no attorney would make a contemporaneous objection at trial, raise the issue in the Notice of Appeal, and then deliberately exclude the issue from his petition for appeal with the intent of later running the issue through today's habeas gauntlet.

This Court in *Sykes* also stressed that it left "for another day" the scope of federal habeas review "of claims not made in accordance with state procedure where the criminal defendant has surrendered, other than for reasons of tactical advantage, the right to have all of his claims of trial error considered by a state appellate court." 433 U.S. at 88 n.12. Of course, it may be the case here that appellate counsel made a strategic decision to abandon the discovery issue on appeal. It may also be that the matter was left out due to negligence or inadvertence.

Heath v. *Alabama*, 54 U.S.L.W. 4016, 4018 U.S. December 3, 1985).

Moreover, the Commonwealth did not argue this matter to either of the courts below or to the state courts on habeas. It should be noted that in its Motion To Dismiss in the district court the Commonwealth, in arguing failure to exhaust, asserted that Carrier could file a petition for a writ of habeas corpus in the state courts urging *Sykes* "cause" or "ineffective assistance of counsel for failure of his counsel to raise the issue at trial or on appeal." (R. I at tab 3). However, at no time in any of its papers filed either on state habeas or in either court below did the Commonwealth present the argument that trial counsel did not properly preserve the claim of error at trial.

For both of these reasons, the Solicitor General incorrectly urges this Court to reach that issue at this time. (S.G. Brief at 21).

The resolution of this factual issue is precisely the purpose of the Fourth Circuit's remand.[9]

Affirmance by this Court will hardly lead to a parade of convicted felons being set free. That fear relies on the questionable assumption that state criminal trials are rife with constitutional error. Moreover, these dire predictions are not germane to this case. Relief will be limited to those narrow situations in which the meritorious issue was preserved by a contemporaneous objection at trial, raised in a Notice of Appeal, and then not pursued upon further briefing. The number of such cases is miniscule.

Further, affirmance of the Fourth Circuit decision will not unduly burden the federal courts. In the small number of cases meriting an evidentiary hearing, the scope of the inquiry would be limited to a determination of counsel's motivation and, perhaps, whether counsel consulted with his client about the issues the record presented. Such a hearing could occur upon sworn affidavits, at least to the extent of establishing a *prima facie* case. Even this requirement can be avoided if such an inquiry is made in the state court's habeas proceeding.

The Commonwealth suggests that this case differs from the situation to which Justice Blackmun referred in *Jones* v. *Barnes*. (Pet. Brief at 16 n.14). In *Jones*, the habeas petitioner asserted that he was denied his sixth amendment right to effective assistance of counsel on the ground that his attorney did not include in his appellate brief issues that the petitioner had briefed in a draft he had presented to counsel. 463 U.S. at 747-48. As this

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[9] The Solicitor General suggests that "there is every reason to believe that counsel's actions in this case were deliberate." (S.G. Brief at 21). There is, of course, no factual finding in the record to support that conclusion.

Court pointed out in *Jones*, there was full and ample consultation between counsel and client before counsel exercised his professional judgment on what issues to raise. *Id.*

This case is quite different. Upon Carrier's allegations below, there was minimal consultation.[10] There is no showing that Carrier was advised of what issues could be raised on appeal and thus, on this record, there was no showing of an opportunity for Carrier to "insist" that his attorney pursue the discovery issue.[11] *Id.* Regardless, the Fourth Circuit appropriately declined to decide the case in a factual vacuum and remanded it to determine what indeed had happened.

The Commonwealth urges that defining *Sykes* "cause" as requiring anything less than ineffective assistance of counsel would "as a practical matter [amount] to a near invalidation of state procedural default rules." (Pet. Brief at 23). While acknowledging *Sykes* as "a great step in the right direction," (Pet. Brief at 23), it also urges that the core of *Sykes* be eviscerated. When this case is correctly seen as having nothing whatsoever to do with the contem-

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[10] In his Motion of Objection and Exception, Carrier asserted, "Petitioner was not allowed by his then court-appointed attorney to fully take part in the preparation of his appeal, nor was he allowed to apraise [sic] it before it had been filed and denied by the State Supreme Court of Virginia." (J.A. 10).

[11] The American Bar Association Standards for Criminal Justice make it incumbent upon appellate counsel to "discuss frankly and objectively with the defendant the matters to be considered in deciding whether to appeal," and to explore carefully "the possible errors that could be pressed on appeal." Commentary to ABA Standard 4-8.2. "To make the defendant's ultimate choice a meaningful one," the Standard advises that counsel must communicate his evaluation of the case "in a comprehensible manner." *Id.*

poraneous objection rule, but only appellate default of a preserved issue, it is clear that the Commonwealth's fears are groundless.

Moreover, if the Commonwealth's argument is adopted by this Court, the "cause and prejudice" exception, so carefully written in *Sykes* to accommodate both the interests of comity and the need to enforce the federal Constitution, would be eliminated totally. Indeed, the Commonwealth admits with candor that that is the force of its argument, for it urges this Court to replace *Sykes* with *Strickland* v. *Washington*, 104 S.Ct. 2052 (1984). (Pet. Brief at 14). The Commonwealth argues that, as long as a defendant has received sixth amendment effective assistance of counsel within the standard of *Strickland*, any defaulted constitutional violation should be deemed foreclosed.

We urge that it is too early after *Sykes* to sweep aside so blithely the careful reasoning of Justice Rehnquist. Moreover, this case does not require it. The underlying discovery issue was raised and argued at trial. The procedural default here is limited solely to the appellate process. Thus, the Fourth Circuit's definition of *Sykes* "cause," confined to the issues presented in this case, is much narrower than the Commonwealth would have this Court believe.

Furthermore, the relief under *Strickland* is quite different from that under *Sykes*. Under *Strickland*, the sixth amendment claim, if established, is itself a ground for habeas relief and results in either freedom for the petitioner or some new procedure in state court. In *Evitts* v. *Lucey*, 105 S.Ct. 830 (1985), for example, this Court held that the petitioner had received ineffective assistance of appellate counsel when his attorney forfeited

his right to direct appeal. *Id.* at 836-37. The remedy this Court upheld was significant: either reinstatement of the appeal in state court or a new trial. *Id.* at 833, 837.

Sykes, however, does not delineate any substantive constitutional right. The only relief it offers the petitioner is federal review of his constitutional claim. Thus, *Strickland* furnishes complete habeas relief, while *Sykes* is only a threshold prerequisite to a determination of whether such relief is appropriate.[12]

Moreover, as a result of the Fourth Circuit's ruling, Carrier does not win release. At most, there will be a hearing to determine the reason that the discovery issue was not pursued in the petition for appeal. There will also be a determination of whether Carrier was prejudiced by this failure. That hearing can be a narrow inquiry appropriate to the issues raised and will produce reasoned factual findings by the district judge upon which a more rational determination can be made as to the *Sykes* criteria.[13] If the district court finds both "cause" and "preju-

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[12] The "prejudice" analyses under *Strickland* and under *Sykes* are also distinct. *Strickland* makes it clear that "prejudice" is demonstrated only when the petitioner can prove the "reasonable probability" that, but for counsel's errors, the result "*would* have been different." 104 S.Ct. 2068 (emphasis added). In *Reed* v. *Ross*, however, this Court has already defined "prejudice" under *Sykes* to mean that, but for the default, the petitioner "*might* not have been convicted." 104 S.Ct. 2901, 2908 (1984) (emphasis added).

[13] The Commonwealth notes that a single error or omission can indeed furnish the basis for *Strickland* relief. *United States* v. *Cronic*, 104 S.Ct. 2039, 2046 n.20 (1983). (Pet. Brief at 14). While we do not urge here that the failure to pursue the discovery issue in the petition for appeal constitutes ineffective assistance of counsel that would afford Carrier the reinstatement of his appeal, *see Evitts*, 104 S.Ct. 830, we do not abandon the claim that counsel's inadvertence may well have been ineffective. Rather, it remains to be determined by the finder of fact upon remand.

dice," Carrier will receive review on the merits. He will not obtain relief unless his federal constitutional rights were violated.

Finally, despite the Commonwealth's assertion to the contrary, the floodgates have not opened as a result of the Fourth Circuit's decision in this case. The Commonwealth points to only three cases raising the issue since the Fourth Circuit's opinion. (Pet. Brief at 13 n.11).[14] In none has the result been the release of the petitioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the holding of the court below should be affirmed.

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[14] The Commonwealth cites *Briley* v. *Bass*, 584 F. Supp. 807 (E.D. Va. 1984); *Hill* v. *Sielaff*, No. 85-0395-R, slip op. at 2 (E.D. Va. June 25, 1985); and *Lopez* v. *Landon*, No. 84-1048-AM, slip op. at 2 (E.D. Va. June 25, 1985).

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No. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD W. MURRAY, ACTING DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent.

REPLY BRIEF FOR PETITIONER

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IN THE

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OCTOBER TERM, 1985

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VIRGINIA DEPARTMENT OF CORRECTIONS,
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v.

CLIFFORD W. CARRIER,
Respondent.

REPLY BRIEF FOR PETITIONER

This case involves application of the "cause and prejudice" standard formulated by this Court in *Wainwright v. Sykes,* 433 U.S. 72 (1977), to an appellate level procedural default. Notwithstanding Carrier's belated assertion to the contrary, the *Sykes* standard is fully applicable to such defaults. A showing of ineffective assistance of counsel is not the only way in which "cause" can be established, but when, as here, in an attempt to establish "cause," a federal habeas petitioner points to the errors or omissions of his attorney, he should not succeed unless his attorney's performance falls below the level of competence required by the Constitution. The contrary conclusion reached by the court below, together with its

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[1]Effective December 20, 1985, Edward W. Murray became Acting Director of the Virginia Department of Corrections, replacing Allyn R. Sielaff, who resigned.

conclusion that the exhaustion doctrine is inapplicable to this case, ignores the precedents of this Court and, if not reversed, threatens to render the States' procedural default rules meaningless.

ARGUMENT

1.

WAINWRIGHT V. SYKES APPLIES TO *APPELLATE* AS WELL AS TRIAL DEFAULTS.

Carrier acknowledged in the Court of Appeals below that the *Sykes* "cause and prejudice" standard applied "to a state procedural bar resulting from failure to raise an issue on appeal." (Carrier Fourth Circuit Brief 8-9). And, he did not take issue with that point in his Brief in Opposition to the Commonwealth's certiorari petition.

Now, for the first time, Carrier argues in his "Brief On Behalf Of Respondent" that *Sykes* should not apply to an *appellate* default.[2] But this Court "will not ordinarily consider" issues which were "neither raised before nor considered by the Court [below]." *Adickes v. S. H. Kress &*

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[2]Because Carrier filed a direct appeal to the Supreme Court of Virginia, the only default involved in the case at bar is failure to present his discovery issue on that appeal. *Fay v. Noia*, 372 U.S. 391 (1963), to whatever extent it was not overruled by *Sykes* and its progeny, does not support Carrier's argument. *Fay* concerned a failure of the defendant to file *any* direct appeal. As contrasted with the determination of which legal issues are the most viable to pursue on appeal, which is generally a matter for appellate counsel to assess, the question of whether or not to appeal is a personal one for the defendant. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983). For cases indicating that *Fay* (if it now has any validity) is distinguishable on this basis, see, *e.g., Leroy v. Marshall*, 757 F.2d 94, 98-99 (6th Cir.), *cert. denied*, 106 S.Ct. 99 (1985); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 442 (3d Cir. 1982); *Forman v. Smith*, 633 F.2d 634, 640 n.8 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981). *See generally Lawrence v. Peyton*, 209 Va. 610, 614-615, 166 S.E.2d 277, 281 (1969) (where defendant indicates a desire to take an appeal, counsel must perfect an appeal). Any question of whether *Fay v. Noia*, limited to its facts, retains vitality, is not before the Court in the instant case.

Co., 398 U.S. 144, 147 n.2 (1970). "Non-jurisdictional defects. . .should be brought to [this Court's] attention *no later* than in respondent's brief in opposition to the petition for certiorari." *City of Oklahoma City v. Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2432 (1985) (emphasis in original). Nevertheless, Carrier's belated argument is without merit.

In *Reed v. Ross*, ___ U.S. ___, 104 S.Ct. 2901 (1984), this Court applied *Sykes* to an appellate default[3] which occurred in the North Carolina Supreme Court, stating:

> The question presented in this case is whether Ross' attorney forfeited Ross' right to relief under *Mullaney* and *Hankerson* by failing, several years before those cases were decided, to raise *on appeal* the unconstitutionality of the jury instruction on the burden of proof.

104 S.Ct. at 2903 (emphasis added). Indeed, recognizing the State's interest in maintaining the integrity of its rules and proceedings and the finality of its judgments, this Court said:

> North Carolina's rule requiring a defendant initially to raise a legal issue *on appeal*, rather than on postconviction review, performs such a function. It affords the state courts the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142, 147 (1970). This type of rule promotes not only the

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[3]In *Ross*, this Court concluded that the habeas petitioner had shown "cause" under *Sykes* for his appellate default. The Court found "cause" in that, at the time of Ross' direct appeal, an objection to the burden-shifting jury instruction was so novel that its legal basis was not reasonably available. 104 S.Ct. at 2910, 2912. Under North Carolina law at that time, a contemporaneous objection at trial was not necessary to preserve for appellate review a question involving jury instructions. 104 S.Ct. at 2906 n.4.

> accuracy and efficiency of judicial decision, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the *appellate court* is focused on his case. . . .

104 S.Ct. at 2907 (emphasis added).

Similarly, *Jones v. Barnes*, 463 U.S. 745 (1983), reflects *Sykes'* application to appellate defaults. There, this Court noted that it had no occasion to decide whether appellate counsel's "*refusal* to raise *requested* claims" on appeal, claims upon which his client has insisted, would constitute "cause" for petitioner's default under *Sykes*.[4] 463 U.S. at 754 n.7 (emphasis added); *see also id.* at 755. This certainly implies the applicability of *Sykes* to appellate defaults in general.

Furthermore, Justice Blackmun, in his concurring opinion in *Rose v. Lundy*, 455 U.S. 509 (1982), acknowledged the application of *Sykes* even to *post*-appeal defaults at state habeas proceedings. Observing that a state may adopt a rule directing habeas petitioners to present all their claims at one time, Justice Blackmun noted that "a prisoner's failure to adhere to that procedural requirement, absent cause and prejudice, would bar subsequent federal habeas relief on additional grounds," citing *Sykes* and other authority.[5] 455 U.S. at 525 n.2 (Blackmun, J., concurring).

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[4]Not only is there "no showing" (Carrier Brief 17) that Carrier insisted on the discovery issue being raised, no such *allegation* was ever made by him.

[5]The Commonwealth did not assert in the federal courts below that Carrier, in addition to defaulting on direct appeal, had defaulted at his state habeas proceeding by not alleging ineffective assistance of appellate counsel. Consistent with that position below, the Commonwealth has represented to this Court that it would not assert default under the state habeas statute if Carrier returns to the state court, because after Carrier's *pro se* state habeas proceedings were completed, Virginia abandoned the "farce and mockery" standard for judging effectiveness of counsel. (Comm. Brief 29 n.25).

Most of the United States Courts of Appeals which have determined the application of *Sykes* to a failure to raise particular claims on direct appeal have held that the *Sykes* standard controls.[6] Logic and this Court's recent pronouncements dictate application of *Sykes* to such defaults. Indeed, the four central factors identified in *Sykes*—finality of judgments, comity and federalism, accuracy of issue resolution, and integrity of the criminal trial process (*Sykes*, 433 U.S. at 89–93)—are applicable to appellate defaults as well as to those occurring at trial.

Finality of Judgments

As stressed in *Reed v. Ross*, a state rule requiring a defendant to raise his claims on direct appeal rather than in subsequent habeas corpus proceedings serves the interest of finality of judgments. It encourages litigation of all claims together promptly after the trial and while the case is under the focus of the appellate court. *Ross*, 104 S.Ct. at 2907.

In *United States v. Frady*, 456 U.S. 152 (1982), this Court considered the damage done when an inmate attacks his conviction after the appeal stage has passed. "Once the defendant's chance to appeal has been waived or exhausted, . . . we are entitled to presume he stands fairly and finally convicted. . . ." 456 U.S. at 165. With this in

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[6] *E.g., Forman v. Smith*, 633 F.2d 634, 640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981); *Cole v. Stevenson*, 620 F.2d 1055, 1059-1062 (4th Cir.) (en banc), *cert. denied*, 449 U.S. 1004 (1980); *Huffman v. Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981); *Evans v. Maggio*, 557 F.2d 430, 433-434 (5th Cir. 1977); *Leroy v. Marshall*, 757 F.2d 94, 97-99 (6th Cir.), *cert. denied*, 106 S.Ct. 99 (1985); *United States ex rel. Spurlark v. Wolff*, 699 F.2d 354, 357-361 (7th Cir. 1983) (en banc); *Myers v. State of Washington*, 646 F.2d 355, 357-358 (9th Cir. 1981), *vacated and remanded on other grounds*, 456 U.S. 921 (1982); *Ford v. Strickland*, 696 F.2d 804, 816 (11th Cir.) (en banc), *cert. denied*, 464 U.S. 865 (1983). *See also Graham v. Mabry*, 645 F.2d 603, 606-607 (8th Cir. 1981) (indicating that *Sykes* applies to defaults except that *Fay* applies where the matter is a fundamental decision to be made personally by defendant, such as whether to appeal at all, whether to waive a jury, and whether to plead guilty).

mind, the Court noted that "a collateral challenge may not do service for an appeal." *Id.* at 166. *See also United States ex rel. Spurlark v. Wolff,* 699 F.2d 354, 359 and 361 (7th Cir. 1983) (en banc).

Comity and Federalism

The second factor of *Sykes*, comity and federalism, applies just as forcefully to state appellate procedures as it does to state trial procedures. "Unless the procedure itself raises due process concerns, a state has an obvious interest in having its *appellate* procedures maintained without circumvention in federal courts." *Forman v. Smith*, 633 F.2d 634, 639-640 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) (emphasis added).

In the context of a trial default, this Court has said that "[t]he state *appellate* courts have not had a chance to mend their own fences and avoid federal intrusion." *Engle v. Isaac*, 456 U.S. 107, 129-130 (1982) (emphasis added). This observation also has validity regarding appellate defaults.

This Court has held that issuance of a federal habeas writ, where there has been a trial default, "exacts an extra charge by undercutting the State's ability to enforce its procedural rules." *Id.* at 130. A similar toll is exacted if a default on the state appeal may be circumvented on federal habeas review. Even if the claim is presented on state habeas corpus, an appellate default leaves the state appellate court with the choice of ignoring its own procedural rules and allowing state habeas corpus to be used as a substitute for direct appeal, or enforcing its rule with the knowledge that the merits of petitioner's claim will nevertheless be decided by a federal habeas court.

Carrier's assertion that the Commonwealth has raised the specter of "a parade of convicted felons being set free" and that such a fear is based upon "the questionable assumption that state criminal trials are rife with constitutional error" (Carrier Brief 20) misinterprets the Commonwealth's position. The valid interest in comity and

federalism is not so much concerned with convicted state prisoners being *released* as a result of federal habeas proceedings as it is with the intrusiveness of federal review where the number of meritorious cases is, at best, marginal. (Comm. Brief 20 and n.18). The Commonwealth has never premised its argument upon an assumption that state criminal trials are rife with constitutional error. The statistics demonstrate that just the opposite is true. State criminal trials clearly are not rife with constitutional error, but state prisoners are "rife" with meritless constitutional claims which threaten to overwhelm and render ineffective the system designed to protect them. (*Id.* at 20 n.17).

Contrary to Carrier's assertion, the effect of affirming the decision below would not be "minuscule." (Carrier Brief 20). As the American Civil Liberties Union (ACLU) has made clear, it is their position that if a federal habeas petitioner alleges attorney error or omission as "cause" for a procedural default in state court, he will be entitled in most, if not all, instances to an evidentiary hearing in federal court. (ACLU Brief 38-39). There is no reason to believe, as Carrier asserts, that the Court of Appeals' ruling would be limited to those few cases where appellate counsel had raised a claim in the notice of appeal but had not addressed it in his brief. As a consequence, in almost every case in which the attorney of a convicted state prisoner pares down the number of claims which could be asserted on direct appeal, and as a result of that process one or more claims are abandoned, the prisoner will seek a federal evidentiary hearing if he subsequently attempts to resurrect one or more of the claims that were abandoned on direct appeal. At a minimum, federal fact finding would be required. Experience demonstrates that the filing of affidavits typically results in sharpened issues of fact which must be resolved at an evidentiary hearing. Viewed in conjunction with Carrier's contention that the exhaustion doctrine does not apply to an assertion of "cause" for a procedural default (Carrier Brief 9-11), the devastating impact of affirming the decision below is clear. As the Commonwealth has stated in its opening brief, no

longer would the state trial and direct appeal be the "main event," but rather the focus would shift to collateral proceedings in federal court. (Comm. Brief 17).

Accuracy

Sykes' third concern, accuracy, is highly relevant to a requirement that all issues be presented on direct appeal. *See Ross,* 104 S.Ct. at 2907. Because state remedies must be exhausted prior to federal habeas proceedings, state appellate review generally occurs much earlier. In the instant case, for example, Carrier's direct appeal was filed on October 19, 1977, four months after final judgment was entered by the state trial court, but his federal habeas petition was not filed until September 19, 1980. The lapse of time can have a major impact on both the availability and recollection of witnesses. *See Ross,* 104 S.Ct. at 2907; *Forman v. Smith,* 633 F.2d at 640. And there is no particular time frame within which a habeas corpus petition must be filed. Some are filed many years after the conviction and direct appeal.

Integrity of State Proceedings

Finally, there is the factor of the integrity of the state proceedings. That is, all issues should be fully litigated and developed in the state courts with no inducement for the defendant or his attorney to "sandbag," *i.e.*, withhold issues with the expectation of later submitting them to what may be perceived as a more favorable federal forum. And, "[c]ertainly, whatever the potential for abuse of the state proceeding by an attorney seeking a tactical advantage, this risk is as great at the appellate level as it is at the original trial." *Forman,* 633 F.2d at 640. In this context, the United States Court of Appeals for the Seventh Circuit, sitting en banc, recently observed:

> [W]e perceive that there is a tactical reason for a state prisoner not to present certain claims to the state courts on direct appeal that was not present when *Fay* was decided. In *Sumner v.*

> *Mata*, 449 U.S. 539 . . . (1981), the Court held that factual determinations made by a state appellate court are entitled to a presumption of correctness. In a claim such as ineffective assistance of counsel a state prisoner may believe that it is in his best interest not to present the issue to the state appellate court, which will make a factual determination shortly after the trial that will be entitled to a presumption of correctness, but rather to wait until memories have faded to present his claims to a federal court on a habeas petition.

United States ex rel. Spurlark v. Wolff, 699 F.2d at 361. Additionally, the defendant may wish to avoid the persuasive impact on the federal habeas court of well-reasoned opinions rendered by the state appellate judiciary.

Thus, Carrier's contention that "no attorney" would ever be guilty of "sandbagging" during the appellate process (Carrier Brief 19) is without merit. Under the approach of the Circuit Court below, "sandbagging" during the appellate process is virtually invited. The prisoner would have little, if any, reason to risk an adverse finding by the state appellate courts and the possible impact of 28 U.S.C. § 2254(d).

As the foregoing discussion makes clear, this Court has already applied the *Sykes* criteria to appellate level defaults. Furthermore, the bases for applying the *Sykes* test to appellate defaults are entirely sound. For these reasons, this Court should reject Carrier's belated attempt to render *Sykes* inapplicable to procedural defaults which occur on direct appeal.

2.

THE COMMONWEALTH IS NOT ASSERTING THAT ONLY INEFFECTIVE ASSISTANCE OF COUNSEL CAN CONSTITUTE *SYKES* "CAUSE."

Contrary to Carrier's characterization, the Commonwealth does not assert that as long as a defendant has

received Sixth Amendment effective assistance of counsel, any defaulted constitutional claim would be foreclosed. (Carrier Brief 22). There may be any number of acceptable forms of "cause." For example, this Court has held that where a claim is so novel that the tools were not available for counsel to have timely fashioned it in the state court, *Sykes* "cause" has been established. *Reed v. Ross*, 104 S.Ct. at 2910, 2912.[7] Other types of "cause" have been suggested by amici curiae. They include unreasonable refusal by the state court to entertain an objection, default resulting from incapacity or interference by officials, or some other impediment not attributable to the defendant or his lawyer that prevented assertion of the claim. (U.S. Solicitor General's Brief 16; Fla. A.G.'s Brief 28-29). By no means is the Commonwealth asking this Court "to sweep aside . . . the careful reasoning of Justice Rehnquist" in *Sykes*. (Carrier Brief 22). To the contrary, the Commonwealth fully embraces the reasoning of the *Sykes* opinion.

3.

THE RELIEF GRANTED WHEN THE *SYKES* TEST IS SATISFIED IS, IN EFFECT, NO DIFFERENT THAN THE RELIEF GRANTED WHEN THE *STRICKLAND* TEST IS SATISFIED.

Carrier contends that "cause" under *Sykes* based upon attorney error need not rise to the level of constitutional ineffective assistance of counsel. In support of this contention he asserts that relief for a Sixth Amendment violation is "quite different" from the type of relief granted under *Sykes*. (Carrier Brief 22). He argues that a finding of ineffective assistance of counsel "furnishes complete habeas relief, while *Sykes* is only a threshold prerequisite to

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[7]Contrary to the ACLU's suggestion (ACLU Brief 22, 47), this Court did not indicate in *Ross* that attorney error short of ineffective assistance of counsel could constitute "cause" under *Sykes*. "Resolution of [the novel issue] question turns not on the state of mind of the attorney, but on the state of the law at the time of trial, which is an objective external factor." (U.S. Solicitor General's Brief 20).

a determination of whether such relief is appropriate." (*Id.* at 23). Both Carrier and the ACLU assert that "prejudice" under *Sykes* and "prejudice" under *Strickland* v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052 (1984), are separate and distinct, and that a habeas petitioner must meet a higher standard to demonstrate "prejudice" for purposes of a Sixth Amendment violation. (Carrier Brief 23 n.12; ACLU Brief 30).

All of these contentions are without merit. As the Commonwealth asserted in its opening brief, when a federal habeas petitioner seeks to excuse his procedural default in state court by pointing to the inadequacies or errors of his trial or appellate counsel, it is *Strickland* which should provide the analytical framework. (Comm. Brief 14). The nature of our adversary system simply demands that, unless ineffective assistance of counsel is demonstrated, the errors or omissions of trial or appellate counsel must be binding upon a convicted criminal defendant.[8] (Comm. Brief 14-19).

Furthermore, contrary to the assertions of Carrier and the ACLU, the analyses under *Sykes* and *Strickland* are not entirely separate and distinct.[9] Consistent with both *Sykes* and *Strickland*, this Court could hold that, if attorney error is asserted as "cause" for a procedural default in state court, the federal habeas petitioner must demonstrate that counsel's performance was objectively deficient, *i.e.*,

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[8]The contrary conclusion reached by the court below has led to confusion in the federal district courts. *See Giarratano v. Procunier*, C.A. No. 83-185-N, slip op. at 9 n.6 (E.D. Va. Oct. 1, 1985) ("The *Carrier* case. . .leaves federal trial courts in this circuit in a quandary..."). (A copy of this unpublished opinion has been lodged in the Clerk's Office of this Court).

[9]Even the Court of Appeals below acknowledged that if the attorney's omission was a deliberate tactical decision, the habeas petitioner "must show that counsel's particular decision amounted to a breach of the Sixth Amendment in order to overcome the *Wainwright* [*v. Sykes*] bar." 724 F.2d 396, 401 (4th Cir. 1983). Obviously, the Circuit Court does not consider a *Sykes* analysis to be totally distinct from an analysis under the Sixth Amendment.

"that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Strickland*, 104 S.Ct. at 2064.

While acknowledging that a single error of counsel may provide the basis for relief under the Sixth Amendment, *see United States v. Cronic*, ___ U.S. ___, 104 S.Ct. 2039, 2046 n.20 (1984), the ACLU asserts that equating *Sykes* "cause" with the performance prong of *Strickland* will encourage habeas petitioners to assert that isolated errors by counsel are sufficient to establish Sixth Amendment violations. (ACLU Brief 28). Not surprisingly, the ACLU offers no statistical support for this assertion. Anyone who is familiar with the federal habeas petitions of state prisoners knows that such prisoners need no incentive whatsoever to allege that even the most insignificant error or omission by counsel is sufficient to constitute a Sixth Amendment violation.

In support of their contentions that "prejudice" under *Sykes* is different from "prejudice" under *Strickland*, both Carrier and the ACLU rely upon *Reed v. Ross*, 104 S.Ct. at 2908. That reliance, however, is misplaced. While it is true that in *Ross* this Court stated that if Ross' jury had not been improperly instructed on the allocation of the burden of proof "he might not have been convicted of first-degree murder," the State of North Carolina had already conceded both in this Court and the lower federal courts that Ross had suffered "actual prejudice" under *Sykes*. *Ross*, 104 S.Ct. at 2908. This Court thus had no occasion in *Ross* to define the concept of *Sykes* "prejudice." *Ross* was concerned entirely with the "cause" prong of the *Sykes* standard.

In *United States v. Frady*, however, this Court discussed *Sykes* "prejudice" at length, and it is clear that "prejudice" under *Sykes* is at least as stringent a standard as "prejudice" under *Strickland*. In the context of a failure to object to an ailing jury instruction, which incidentally was the same type of error as in *Ross*, "prejudice" is not

demonstrated unless the erroneous instruction so infected the entire trial that the resulting conviction violates due process. *Frady*, 456 U.S. at 169. The Court found no *Sykes* "prejudice" in *Frady* because there was "no risk of a fundamental miscarriage of justice," 456 U.S. at 172, and "no substantial likelihood the erroneous . . . instructions prejudiced Frady's chances with the jury." 456 U.S. at 174.

"Prejudice" under *Strickland* has been explicitly defined by this Court as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome," and "a court making the prejudice inquiry must ask if . . . the decision reached would reasonably likely have been different absent the errors." 104 S.Ct. at 2068, 2069. Thus, in both *Frady* and *Strickland*, this Court defined "prejudice" in terms of a reasonable (substantial) likelihood (probability) that if the asserted error had not been committed, the outcome of the proceeding in question would have been different.

That *Sykes* "prejudice" must rise at least to the level of *Strickland* "prejudice" is demonstrated by a simple observation. After reviewing the great bulk of the relevant cases, the Commonwealth is unaware of even a single case where a federal court has found that a habeas petitioner had demonstrated both "cause" and "prejudice" under *Sykes*, but was nevertheless refused habeas relief. Thus, Carrier's claim that the relief granted for satisfying the *Strickland* test is different and far greater than the relief granted for satisfying the *Sykes* test is a hollow one. A finding of "cause" and "prejudice" under *Sykes* is far more than a mere threshold inquiry. For all intents and purposes, if a habeas petitioner is able to satisfy *Sykes*, he is thereby able to obtain the very same relief that he would have obtained by demonstrating ineffective assistance of counsel.

4.

THE EXHAUSTION DOCTRINE IS APPLICABLE TO ASSERTIONS OF "CAUSE" AND IN THIS CASE THERE IS AN AVAILABLE STATE REMEDY ON THE ISSUE OF WHETHER RESPONDENT CAN SHOW "CAUSE" UNDER STATE LAW FOR HIS PROCEDURAL DEFAULT ON DIRECT APPEAL.

In the brief amici curiae filed in support of Carrier, the ACLU stated:

> If in the case at bar the warden [petitioner] means only that the prisoner [respondent] should be asked to employ available and effective state court opportunities to persuade the state courts to overlook his attorney's default, then we can identify no threat to the congressional plan for protecting Mr. Carrier's genuine interests.
>
> * * *
>
> [W]e are reconciled to the view that a prisoner whose substantive federal claim appears to be procedurally barred under state law may be called upon to present to the state courts, by reasonably identifiable means, a state law basis for overlooking default and reaching the merits. This appears to be the core lesson to be drawn from *Pitchess* [*v. Davis*, 421 U.S. 482 (1975)].
>
> * * *
>
> State law may well recognize exceptions to the ordinary forfeiture sanction in circumstances which mirror those associated with "cause" in federal habeas. The issue in state court is, however, one of state law alone.

(ACLU Brief 56-58).

The ACLU has correctly identified the Commonwealth's position with respect to the exhaustion issue. At no time

has the Commonwealth ever advocated that Carrier must return to state court so that the state courts be given the opportunity to determine whether he can demonstrate *Sykes* "cause" for his procedural default on direct appeal. What the Commonwealth does advocate is that the state courts must be given the opportunity to determine, as a matter of state law, whether there is "cause" to excuse Carrier's procedural default, *i.e.*, whether there is, in fact, an enforceable procedural default under state law.

While the ACLU takes no position as to whether any state remedies remain available in this case (ACLU Brief 58),[10] Carrier contends that no state remedies are available to him and that any effort to exhaust at this point would be futile. (Carrier Brief 11-16). His contention, however, appears to be based upon a misapprehension of both the Commonwealth's position and Virginia law.

Contrary to Carrier's assertion (Carrier Brief 11-12), the Commonwealth has never maintained, nor does state law allow, that a petitioner for a writ of habeas corpus in Virginia "may raise . . . only those issues which meet the requirement of Virginia Supreme Court Rule 5:21." In fact, just the opposite is true. Under Virginia law, a claim which could have been raised at trial and on appeal generally cannot be raised in a habeas corpus proceeding, *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1974), *cert. denied*, 419 U.S. 1108 (1975), and a claim which was, in fact, raised at trial and on appeal normally cannot be relitigated in a habeas corpus proceeding. *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970). Habeas corpus cannot be used as a substitute for an appeal. *Brooks v. Peyton*, 210 Va. 318, 171 S.E.2d 243 (1969).

Virginia's contemporaneous objection rule is irrelevant to the issue of whether there remains an available state

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[10]The ACLU notes, however, that the district court, by virtue of its familiarity with Virginia law, would be in the best position to determine if state remedies remain available. (ACLU Brief 61). The Commonwealth agrees. The fact of the matter, however, is that the district court has already determined that there is an available state remedy in this case. (Pet. App. 28 n.*; R.I. tab 13).

remedy in this case except to the extent that the rule and its exception for "good cause" and the "ends of justice" have been applied in the context of the rule of *Parrigan* by the Supreme Court of Virginia.[11] The contemporaneous objection rule only purports to define which issues can be raised *on appeal*. The question before this Court with respect to the exhaustion issue is whether Carrier still has an available state remedy *on habeas corpus*. It is the rule of *Parrigan* to which the Court must look for the answer to that question.

In *Parrigan*, the Virginia Supreme Court held that "when a prisoner has been afforded a *fair and full opportunity* to raise and have adjudicated [his claim] . . . in his trial *and upon appeal*,"[12] habeas corpus review is not available except for jurisdictional defects. 215 Va. at 29, 205 S.E.2d at 682 (emphasis added). The Court also found that inmate Parrigan was not entitled to consideration of

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[11]As Carrier points out (Carrier Brief 13 n.5), Rule 5:21, which was in effect at the time of his procedural default on appeal, has now been divided into Rules 5:17 and 5:25. While Rule 5:17 pertains to appellate defaults such as Carrier's, it specifically incorporates Rule 5:25, with its "good cause" and "ends of justice" exception, to define the limits of what questions may be litigated on appeal *when they are not raised in the petition for appeal.*

Furthermore, the Virginia Supreme Court, in applying *Parrigan*, has cited that case in conjunction with the state contemporaneous objection rule. *See Coppola v. Warden*, 222 Va. 369, 373, 282 S.E.2d 10, 12 (1981).

[12]Carrier's contention that there is no exception under Virginia law for a procedural default on appeal (Carrier Brief 14) is without merit. *Parrigan*, by its very terms, applies to claims which could have been raised at "trial and upon appeal" but were not so raised. Thus, *Parrigan* and its exceptions apply not only to claims which were not raised at trial, but also to claims such as Carrier's which were raised at trial but were not raised on appeal. *See Parrigan*, 215 Va. at 30, 205 S.E.2d at 682. *See also Superintendent v. Hayes*, 215 Va. 122, 207 S.E.2d 823 (1974); *Superintendent v. Jackson*, 215 Va. 251, 208 S.E.2d 739 (1974). The Supreme Court of Virginia, in unpublished habeas corpus decisions, has consistently applied *Parrigan* to procedural defaults which occur solely at the appellate level. *See, e.g., Johnson v. Warden*, Record No. 841684 (March 5, 1985) (copy lodged with the Clerk's Office).

his claim for the first time on habeas corpus "absent a showing of ineffective assistance of counsel in failing to raise that question."[13] *Id.*

Thus, in the case at bar, Carrier has an available state remedy which he has never attempted to exhaust. Contrary to his assertion in this Court (Carrier Brief 14), Carrier has not "made every reasonable effort to exhaust" state remedies. In answer to Carrier's state petition for a writ of habeas corpus, the Commonwealth filed a motion to dismiss which not only pointed out Carrier's procedural default on direct appeal, but also cited *Parrigan* and invited from Carrier an explanation for that default. (R.I. tab 13). Carrier, however, never furnished the Virginia courts with such an explanation.[14]

The fact that Carrier did not have counsel in his state habeas proceedings does not excuse his failure to proffer an explanation for his default. Carrier also did not have counsel in federal district court, but that fact did not pre-

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[13]This is not to say that ineffective assistance of counsel is the only "cause" for a procedural default under Virginia law. In other contexts, where the habeas petitioner does not assert attorney error as "cause," there may well be other types of "cause." *See DiPaola v. Riddle*, 581 F.2d 1111, 1114 (4th Cir. 1978), *cert. denied*, 440 U.S. 908 (1979) (*Parrigan* does not foreclose claims "which, for good reasons, could not have been asserted earlier"). Indeed, the Virginia Supreme Court in *Parrigan* specifically couched its holding in terms of habeas review being foreclosed where the prisoner had "a fair and full opportunity" to raise and adjudicate his claim at trial and on appeal. But where, as here, the habeas petitioner asserts attorney error as his excuse, the alleged deficiency must rise to the level of ineffective assistance of counsel.

[14]Incredibly, Carrier seems to suggest that the state courts should have afforded him an evidentiary hearing before dismissing his petition for procedural default. (Carrier Brief 19 n.6). It is elementary, under both federal and state law, that a habeas petitioner is not entitled to an evidentiary hearing unless he alleges facts which, if true, would entitle him to relief. *Townsend v. Sain*, 372 U.S. 293, 312 (1963); *Arey v. Peyton*, 209 Va. 370, 164 S.E.2d 691 (1968). Even a cursory review of Carrier's state habeas pleadings demonstrates that he not only alleged insufficient facts to warrant a hearing on the issue of procedural default, but no facts whatsoever.

vent him from asserting that he was not to blame for his procedural default and that he had been victimized by "ineffective assistance of counsel." (J.A. 10-11). Even in his brief filed in this Court, Carrier has refused to abandon a claim that he was denied his Sixth Amendment right to the effective assistance of counsel and has stated that the claim "remains to be determined by the finder of fact upon remand." (Carrier Brief 23 n.13). This is the very type of "cause" which *Parrigan* expressly recognized could excuse a procedural default under Virginia law. If Carrier had made such an explanation in state court and the state courts had nevertheless dismissed his petition, he would be correct in asserting that state remedies have been exhausted. Having failed to give the state courts the opportunity to determine whether, under state law, there is a valid excuse for his procedural default, however, Carrier's claim of exhaustion is an empty one.

Finally, despite the Commonwealth's representation that if Carrier is made to return to State court the Commonwealth will not assert Va. Code § 8.01-654(B)(2) as a procedural bar (Comm. Brief 29 n.25), Carrier claims that no state remedy is available because there is "no assurance" that the Virginia courts will not apply the statutory bar nevertheless. (Carrier Brief 16). But this Court need not find such an "assurance" as a predicate to requiring Carrier to exhaust his state remedies.

While it is true that, in appropriate circumstances, it may be found that a further attempt to exhaust state remedies would be futile, *see Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982), such futility should not be found where there is "a reasonable *possibility* that an exception to the [state procedural] bar is available." *Richardson v. Turner*, 716 F.2d 1059, 1062 (4th Cir. 1983) (emphasis added), *citing Santana v. Fenton*, 685 F.2d 71 (3d Cir. 1982), *cert. denied*, 459 U.S. 1115 (1983).[15]

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[15]In *Engle v. Isaac*, this Court agreed with both lower federal courts, which were thoroughly familiar with Ohio law, that no state remedies remained available. 456 U.S. at 125 n.28. In the present case, a finding

In the case at bar, there is at least "a reasonable possibility" that § 8.01-654(B)(2) will not be applied by the Virginia courts to bar Carrier from habeas relief. As was set forth at length in the Commonwealth's opening brief (Comm. Brief 29 n.25), the particular facts of this case, as well as the fact that the Commonwealth will not assert the statute as a defense,[16] make it quite likely that the state courts will not apply the statute to Carrier. The federal district courts in Virginia, in the absence of a ruling by the state courts that the statute bars relief, have been unwilling to hold that the statute allows for no exceptions and that its very existence renders futile a return to state court for a second habeas proceeding. *See, e.g., Jones v. Booker*, C.A. No. 84-0439-R, slip op. (E.D. Va. Nov. 21, 1984); *Murdock v. Virginia*, C.A. No. 83-431-N, slip op. (E.D. Va. Jan. 17, 1984) (Copies of these unpublished decisions have been lodged in the Clerk's Office of this Court).

Carrier has conceded that, if this Court decides that an assertion of attorney error as *Sykes* "cause" must rise to the level of ineffective assistance of counsel, he must re-

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by this Court that no state remedies remain available would be contrary to the finding of the district court that a state remedy is available.

In both *Richardson* and *Santana*, the federal courts found that unlike the situation in *Engle v. Isaac*, where the Ohio procedural bar "clearly applied," there was "a reasonable possibility" that the procedural bars of North Carolina and New Jersey, respectively, would not be applied to bar relief. *Richardson*, 716 F.2d at 1062; *Santana*, 685 F.2d at 75.

[16]In its brief amici curiae, the ACLU expressed concern that if Carrier is made to return to state court and the state courts nevertheless apply § 8.01-654(B)(2) to bar relief, Carrier will be met with a two-fold procedural default defense when he returns to federal habeas. (ACLU Brief 59 n.14). Thus far in Carrier's federal habeas proceedings, the Commonwealth has not asserted the statute as a defense because the Commonwealth does not believe that the statute should be applied to the particular facts of his case. If, upon a return to state court, the statute is applied to bar relief, the Commonwealth will not attempt to benefit from Carrier's unsuccessful return to state court, and will not assert his procedural default under § 8.01-654(B)(2) as an additional defense if Carrier subsequently returns to federal court for relief.

turn to state court because he has failed to exhaust state remedies.[17] (Br. Opp. 4). Even if this Court were to decide that attorney error need not rise to the level of ineffective assistance of counsel in order to constitute "cause," the facts of this case demonstrate that a state remedy remains available to Carrier. For these reasons, this Court should vacate the decision of the court below and direct that the case be remanded to the district court with instructions to dismiss.

CONCLUSION

The Commonwealth of Virginia urges the Court to reject Carrier's belated attempt to render the *Sykes* standard inapplicable to appellate level procedural defaults. While ineffective assistance of counsel is not the only type of *Sykes* "cause," a habeas petitioner cannot demonstrate such "cause" by pointing, as Carrier has done, to the alleged errors of his attorney unless the attorney's performance falls below the level demanded by the Constitution. Affirmance of the Fourth Circuit's ruling to the contrary would adversely affect the criminal justice system as a whole with little or no resultant benefit to habeas petitioners. Finally, because a remedy under state law remains available to Carrier concerning his claim of attorney error, he has failed to comply with the exhaustion requirement of 28 U.S.C. § 2254.

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[17]This concession implicitly recognizes, contrary to Carrier's assertions elsewhere, that the exhaustion doctrine is, in fact, applicable to assertions of "cause" cognizable in state court.

Respectfully submitted,

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NO. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner,

V.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA, JOINED BY NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., URGING REVERSAL

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INTEREST OF AMICI CURIAE

The National District Attorneys Association, Inc. ("NDAA") is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. Among other

goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. LFA is located on the campus of, and shares certain personnel and activities with, the South Texas College of Law in Houston. In support of its goals, the Foundation's attorneys have frequently appeared to represent it as amicus curiae in this Court, as well as in the lower courts.

Americans for Effective Law Enforcement, Inc. ("AELE") is a national not-for-profit citizens' organization interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their lives, liberties and property, within the framework of the various state and federal constitutions. AELE has previously appeared as amicus curiae more than 60 times in this Court.

The International Association of Chiefs of Police, Inc. ("IACP"), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publication, legislative reform, and amicus curiae advocacy, IACP seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

SUMMARY OF ARGUMENT

Amici curiae anticipate that the Commonwealth of Virginia, which is represented by capable and diligent counsel, will thoroughly brief arguments centering upon the case law. Amici curiae wish to avoid unnecessary duplication of Virginia's arguments, although we agree with those arguments and wish to express support for them. Therefore, this brief instead concentrates upon issues of public policy. Further, although amici agree with Virginia's arguments regarding Respondent Carrier's failure to exhaust state remedies, this brief is confined to the other issue, concerning "cause" for setting aside state procedural rules.

The court of appeals' approach not only conflicts with the prior decisions of this Court, but would interfere with the effective discharge of the duties of the federal courts, to the disadvantage of diligent attorneys, of the citizenry, and of habeas corpus petitioners. Specifically, the court of appeals' approach would force diligent counsel to forego his own judgments concerning the withholding of objections upon marginal issues, solely to prevent the possibility that later judgments by others may result in the labeling of his conduct in ambiguous matters as a "lapse" or an "error." The result would be to emphasize the presentation of lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. As a collateral consequence, the lower court's reasoning would obliterate the distinction between competent and incompetent counsel, unfairly stigmatizing diligent attorneys.

At the same time, the court of appeals' approach would make federal habeas decisions depend upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. It would encourage abuse of the writ, contributing to the burden of less meritorious cases that makes difficult the federal courts' task of identifying truly meritorious habeas claims.

ARGUMENT

A SINGLE INSTANCE IN WHICH A FULLY EFFECTIVE AND COMPETENT ATTORNEY WITHHOLDS AN OBJECTION OR ARGUMENT SHOULD NOT FURNISH "CAUSE" TO SET ASIDE STATE PROCEDURAL RULES ON GROUNDS NOT AMOUNTING TO INEFFECTIVENESS OF COUNSEL.

The court of appeals, below, characterized the defense attorney's withholding of an issue he had fully preserved for appeal in the state system as probably involving a "momentary lapse by counsel." [1] Amici respectfully submit, instead, that the

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1 Carrier v. Hutto, 724 F.2d 396, 402 (1983). Although the court remanded for an evidentiary hearing, it persisted in the asserted

attorney's decision[2] not to detract from his brief with the extremely marginal[3] claim at issue was not a lapse (not even a momentary one), but rather was effective appellate briefing

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belief that "the likelihood of attorney error appears very great." Id. at 402. (Amici respectfully disagree for reasons set forth infra in notes 3-4.)

2 Counsel actually specified the issue in the state appellate court in his allegations of error. If he had failed to object or specify the issue, inadvertence might be a possibility. A mistake is exceedingly unlikely, however, when counsel has not only objected, but has actually specified the error to the appellate court. Thus amici submit that the probability of deliberate, tactical choice is overwhelming, contrary to the court of appeals' opinion. That choice was wise, for reasons set forth infra in notes 3-4.

3 As the dissenting judge said in the court of appeals, "It is highly unlikely that a valid Brady claim can be drawn from this case." 724 F.2d at 404.

The Brady line of cases requires disclosure of evidence that is "favorable" or "exculpatory." E.g., United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). See also United States v. Bageley, 53 U.S.L.W. 5084, 5086-88 (U.S.S.Ct. July 2, 1985) (citing Brady requirements of "favorable" and "material" evidence; defining materiality as existing "only if there is a reasonable probability that . . . the result of the trial would have been different"). Respondent Carrier's claim, however, is that disclosure should be required under Brady whenever the information is merely "material" to guilt, even if it is not favorable or exculpatory at all. This argument is the claim Carrier now seeks to press. 724 F.2d 396, 399 (1983) (citing Carrier's argument); Respondent's Memorandum in Opposition to Petition for Certiorari at 2 (unprinted version). It is readily apparent that an experienced appellate lawyer would not have asserted this argument if he had any other arguments with any merit at all.

It is surprising that Carrier has argued "boldly," in the words of the dissenting judge, ". . . that he lost a 'sure thing' reversal." Id. at 405. He "lost" no such thing. Instead, again in the words of the dissenting judge, this extremely marginal claim was wisely not argued because "counsel undoubtedly recognized it as a weak issue." Id.

guided by the sound judgment of an experienced advocate.[4] Competent counsel would not file a brief with numerous less persuasive issues that might interfere with consideration of more persuasive ones. Instead, skillful counsel would do as counsel here did: He would select, from among those issues preserved for appeal, those few arguments that he considered most persuasive.[5]

Nevertheless, for purposes of this argument, amici will argue the issue as framed by the court of appeals. We assume, although convinced it is not this case, a case in which counsel has engaged in a "momentary" lapse through "inadvertence," and has therefore not objected to or briefed one among many issues, although counsel has rendered effective representation overall that has fully satisfied the sixth amendment.[6]

For the reasons that follow, amici submit that the existence of a momentary lapse by effective counsel should not result in the setting aside of state procedural rules. Specifically, the court

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4 Even Carrier here speculates that trial counsel's decision was a "willful abandonment" of what he persists, against all indications, in calling "the winning argument." Memorandum in Opposition at 4 (unprinted version, unnumbered note). The dissenting judge correctly describes trial counsel's decision as "both tactical and wise, as counsel undoubtedly recognized it as a weak issue." 724 F.2d at 405.

Indeed, the extreme unpersuasiveness of the claim which Carrier now so pathetically argues was his one "winning" argument, is itself an indication that the decision was tactical. See supra note 3.

5 See infra notes 7-8 and accompanying text; cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982) (discussing myriad of issues at trial and holding counsel effective even though he overlooks or omits arguments).

6 The court of appeals said, in fact, that in this case, "Carrier's trial lawyer appears to have performed with diligence and skill," except for his "unexplained failure to appeal the Brady issue." That failure is not "unexplained," but is instead clearly traceable to trial counsel's sound judgment that the Brady argument was meritless. See supra notes 3-4.

Supreme Court, U.S.
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No. 84-1554

In The

Supreme Court of the United States

October Term, 1984

—o—

ALLYN R. SIELAFF, Director Virginia Department of Corrections,
Petitioner,

v.

CLIFFORD W. CARRIER,
Respondent.

—o—

On Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

—o—

BRIEF OF AMICI CURIAE

—o—

THE STATE OF IDAHO, JOINED BY ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, GEORGIA, GUAM, HAWAII, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, PUERTO RICO, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, THE VIRGIN ISLANDS, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN and WYOMING IN SUPPORT OF PETITIONER.

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QUESTIONS PRESENTED

1. Whether attorney error based on ignorance or inadvertence, which does not constitute ineffective assistance of counsel in violation of the Sixth Amendment, is sufficient to establish the "cause" required to excuse a procedural default under *Wainwright v. Sykes*, 433 U.S. 72 (1977).

2. Whether the exhaustion requirement of 28 U.S.C. § 2254 may be circumvented merely because a claim of attorney error is asserted to establish "cause" under *Wainwright v. Sykes* rather than as an independent ground for habeas corpus relief.

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No. 84-1554

In The
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ALLYN R. SIELAFF, Director,
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v.

CLIFFORD W. CARRIER,

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On Writ of Certiorari to The United States Court of Appeals for The Fourth Circuit

BRIEF OF AMICI CURIAE

INTERESTS OF AMICI CURIAE

Amici curiae, by their Attorneys General, file this brief in support of petitioner pursuant to United States Supreme Court Rule 36.4.

The court below held that attorney error not amounting to ineffective assistance of counsel could constitute cause for a state procedural default, the occurrence of which could otherwise preclude federal habeas relief in

the absence of a showing of cause and prejudice. *Wainwright v. Sykes,* 433 U.S. 72 (1977).

The interests of the several states and territories in this case are readily apparent. All have rules of procedure, the default of which can bar a criminal defendant from litigating claims of error in state appellate courts and by collateral attack in federal courts.

The burden imposed on the criminal justice systems of the states by easily available federal collateral review is well known. Ready access to federal habeas courts to relitigate the validity of state criminal convictions drains limited state resources, contributes to lengthy delay in the final resolution of criminal cases, attenuates the accuracy of the final result, and diminishes public confidence in the ability of state courts to enforce the law. *See* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U.Chi.L.Rev. 142 (1970). Moreover, as Justice Jackson wrote, "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones." *Brown v. Allen,* 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

These concerns have not escaped the notice of the Court and need not be extensively reviewed. *Engle v. Isaac,* 456 U.S. 107 (1982); *Mackey v. United States,* 401 U.S. 667 (1971) (Harlan, J., concurring).

The decision of the Court of Appeals is a matter of compelling importance not just to those jurisdictions in the Fourth United States Circuit, but to the others as well, both because the Court of Appeals has lowered the gates to federal habeas courts and because its decision is a developmental milestone in an area of law not yet well

settled. We believe the Fourth Circuit Court of Appeals has set off down the wrong path.

SUMMARY OF ARGUMENT

1. Federal collateral review of state criminal convictions intrudes, at great cost, on the finality of state judgments, often with little positive benefit. This Court undertook to limit the availability of federal habeas review of procedurally defaulted claims to those cases most likely to involve miscarriages of justice by its decision in *Wainwright v. Sykes,* 433 U.S. 72 (1977). The decision of the Court of Appeals that attorney errors or omissions may constitute "cause" to bypass the procedural default bar of *Sykes,* even though such errors or omissions may not be serious enough to constitute ineffective assistance of counsel, totally undermines the effectiveness of this Court's rule. The Court has distinguished between "ordinary errors" and those of constitutional significance. The Court of Appeals has ignored this distinction and adopted a rule that almost insures that state criminal judgments will rarely be final. That rule is contrary to the decisions of this Court.

Moreover, the rule adopted by the Court of Appeals creates a substantial risk of inaccurate resolution of factual issues in order to address an illusory problem, for federal habeas corpus proceedings rarely uncover genuine grounds for relief.

2. The reasons for the exhaustion requirement of 28 U.S.C. § 2254 are as much applicable to the determina-

tion of whether cause exists to excuse a state procedural default as they are to any other constitutional claim. The decision of the Court of Appeals is likely to encourage bypass of state courts and will certainly contribute to the perception that federal collateral review is almost always inevitable.

———o———

ARGUMENT

I.

The Opinion of the Court of Appeals Without Good Reason Expands the Availability of Federal Review Beyond What Has Been Authorized by This Court

It would be hard to imagine a more effective general nullification of the finality of state court judgments than a rule that attorney omissions of less significance than ineffective assistance of counsel may be considered cause for a procedural default. The Court of Appeals decision to that effect turns a procedural default, intended by *Wainwright v. Sykes*, 433 U.S. 72 (1977), to be in most cases a bar to federal habeas courts, into a ground for relief. What is *not* cause for a procedural default if the occurrence of the default is cause? If the Court of Appeals meant to suggest that only a deliberate bypass of a state procedural rule would bar federal review, it seems clear that this approach was firmly rejected in *Sykes*.

The Court of Appeals summarized its holding by saying:

> Procedural default is excused not when counsel reasonably but incorrectly exercises her judgment, but

> when through ignorance or oversight, she fails to exercise it at all, in dereliction of the duty to represent her client. This is what we mean by attorney error, and in such a case, the defendant should not be penalized under *Wainwright* for a momentary lapse by counsel. *Carrier v. Hutto,* 724 F.2d 396, 401 (1983), *aff'd on rehearing, Carrier v. Hutto,* 754 F.2d 520 (4th Cir.) (en banc), *cert. granted sub nom. Sielaff v. Carrier,* 53 U.S.L.W. 3911 (1985).

The Court of Appeals' formulation has force only if it is assumed that it is the proper function of federal habeas courts to monitor every "momentary lapse by counsel" that might occur in state criminal proceedings. That assumption is clearly wrong.

It was important to the Court in *Sykes* that two competing interests be served. The Court hoped that the "cause and prejudice" rule announced would limit access to federal habeas courts to the most meritorious cases, with the several benefits that progress toward this goal would bring. At the same time, the Court perceived ". . . that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a *miscarriage of justice.*" *Id.* at 91 (emphasis added).

The narrowing intent of *Sykes* is consistent with the Court's long-time view of the function of federal habeas corpus to test "the very gravest allegations." *Townsend v. Sain,* 372 U.S. 293, 312 (1963); *Kaufman v. United States,* 394 U.S. 217 (1969).

The "cause and prejudice" rule of *Sykes* is effectively a device for withholding federal review in those cases

where defaulted claims of error do not bear on whether the result was a miscarriage of justice. In *Sykes* the Court took care to note that the rule would not prevent a litigant who had been the victim of a miscarriage of justice from presenting a federal constitutional claim for the first time in a federal habeas court. Later, in *Engle v. Isaac,* the Court held that although the nature of the defaulted claim of constitutional error as it affects the accuracy of the finding of guilt might well affect the determination of cause and prejudice, the bar of *Sykes* was not meant to apply only against such claims. *Isaac,* 456 U.S. 107.

The rule announced by the Court in *Sykes* that claims of error procedurally defaulted in state courts could not be considered in federal habeas corpus proceedings absent a showing of cause for the default and prejudice to the prisoner is consistent with the view that federal collateral review should not be available unless but for the alleged error there is a reasonable probability the outcome could be different. In this connection, "fairness" is a concept related to the reliability of the outcome of the trial. *See Strickland v. Washington,* — U.S. —, 80 L.Ed.2d 674 (1984).

Judge Friendly argued persuasively that federal collateral review of state criminal adjudications should generally not be available unless the prisoner could make some colorable showing of innocence. Friendly, *supra* at pp. 160, et seq. Although the Court has, of course, not gone this far, its recent decisions have pointed in that direction rather than toward a more expansive view of the availability of federal collateral review. The limitation on the

availability of federal habeas corpus to test Fourth Amendment exclusionary rule claims announced in *Stone v. Powell*, 428 U.S. 465 (1976), was premised in part on the circumstance that exclusion of evidence is not a personal right of an accused person. Failure by the defendant or his counsel to take advantage of a remedial procedure does not deprive the defendant of anything fundamental to his right to a fair trial, nor does it increase the risk of an inaccurate verdict of guilt. In such circumstances it is particularly appropriate to limit the availability of federal collateral review.

Similarly, the Court's observation in *Sykes* that the cause and prejudice bar would not apply to the claim of a defendant who would be the victim of a miscarriage of justice in the absence of federal habeas relief suggests a corresponding limitation on the availability of federal habeas relief to at least those cases presenting a constitutional claim casting genuine doubt on the reliability of the verdict or the fairness of the trial. *See also Engle v. Isaac*, 456 U.S. at 107.

The decision of the court below goes in the opposite direction. There was no showing that the claim Carrier wished to litigate was one casting doubt on the reliability of the verdict of guilt. Instead, Carrier asserted that he had been deprived of an opportunity to examine statements given to the police by the victim of his crime after the court had inspected them *in camera*. It was manifest that his lawyer's failure to appeal the trial court's order did not amount to a violation of the Sixth Amendment standard for effective assistance of counsel. 724 F.2d at 400.

It was not even suggested by the Court of Appeals that the claimed error cast any doubt on the accuracy of the finding that Carrier was guilty of the crime with which he was charged. Instead the lower court held that errors of counsel—if indeed counsel did err—falling short of ineffective assistance in a constitutional sense could constitute "cause" within the meaning of *Sykes*. This is a very broad opening to federal habeas litigation. It means simply that any time counsel fails to object at trial, for whatever reason, or fails to include any issue on appeal, or deliberately or inadvertently omits to raise some legal issue, for whatever reason, and is procedurally barred, a federal court must undertake to consider the effect of the error, and must do so in the absence of any state court ruling on the question.

Between 1961 and 1982 there was a 690% increase in the number of habeas corpus petitions filed in federal courts by state prisoners. Bureau of Justice Statistics, Special Report, U.S. Dep't of Justice, *Federal Review of State Prisoner Petitions—Habeas Corpus* at 1-2 (March, 1984). A Department of Justice study reflects that between 1977 and 1982 there was a 115% increase in appellate review of state prisoner habeas petitions, while overall appellate activity increased at the substantially lower rate of 51%. *Id.* In only 3.2% of the petitions filed was the prisoner given any kind of relief, and in only 1.8% of the petitions filed did the prisoner achieve any kind of release. *Id.* Successful habeas claims, in the great majority of cases, result not in the release of the prisoner but rather in a requirement for further judicial review. *Id.* It is apparent that most federal habeas litigation has little, if anything, to do with miscarriages of justice. Clearly

there is no need to expand the availability of relief as the Court of Appeals has done. As this Court has pointed out, "[o]nce the defendant's chance to appeal has been waived or exhausted . . . we are entitled to presume he stands fairly and finally convicted . . . ." *United States v. Frady*, 456 U.S. 152, 164 (1982).

The foreordained failure of undertaking to review all attorney errors causing procedural default can be appreciated by taking account of the formidable array and volume of ineffective assistance claims typically presented to courts. These have included complaints about the quality of examination and cross-examination of witnesses,[1] counsel's failure to interview witnesses who could have supplied no testimony useful to the accused,[2] counsel's omission to raise frivolous issues or advance baseless claims,[3] tactical use of a defendant's past criminal record,[4] failure to move for a change of venue where there was nothing to show the defendant did not receive a fair trial,[5] failure to object to instructions that correctly stated the law,[6] failure to call particular witnesses believed by the defendant to be more valuable to his cause than those selected by his counsel,[7] failure to demand a preliminary

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[1] *United States v. Benthiem*, 456 F.2d 165 (1st Cir. 1972); *State v. Gutierrez*, 618 P.2d 315 (Hawaii App. 1980).

[2] *Commonwealth v. Rainey*, 422 A.2d 652 (Pa.Super. 1980).

[3] *Commonwealth v. Silvis*, 452 A.2d 1045 (Pa.Super. 1982).

[4] *State v. Williams*, 468 P.2d 909 (Or.App. 1970).

[5] *Morton v. Henderson*, 389 F.2d 699 (6th Cir. 1967).

[6] *Francois v. State*, 423 So.2d 357 (Fla. 1982).

[7] *Johnson v. State*, 238 N.E.2d 651 (Ind. 1968); *State v. Sandy*, 452 N.E.2d 515 (Ohio 1982).

hearing,[8] failure to mount a constitutional attack against a plainly constitutional statute,[9] and failure of counsel to challenge the jurisdiction of a court that obviously had jurisdiction.[10] The apparently unlimited supply of imaginative bases for allegations of Sixth Amendment violation include contentions by pro se litigants who insisted on representing themselves at trial that they were denied effective assistance of counsel because trial judges allowed them to proceed.[11]

It is easy enough to say that each of these examples presents the potential for a miscarriage of justice, but if that is truly a feature of the case the matter is one of ineffective assistance of counsel, not something less. To allow less trivializes the Sixth Amendment protections. If the claims of a prisoner are not at least of the degree of significance of a separate Sixth Amendment claim, there is no good purpose to be served by a second course of review. Judge J. Edward Lumbard of the Court of Appeals for the Second Circuit has said:

> For all our work on thousands of state prisoner cases I have yet to hear of one where an innocent man had been convicted. The net result of our fruitless meddling in search of the non-existent needle in the ever-larger haystack has been a serious detriment to the administration of criminal justice by the states. The State of the Second Circuit, 25 Record, Assn. of Bar of City of New York 511, 516 (1970).

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[8] *Crowe v. State*, 194 N.W.2d 234 (S.D. 1972).

[9] *Maxfield v. State*, 700 P.2d 115 (Idaho App. 1985).

[10] *Brown v. State*, 452 S.W.2d 176 (Mo. 1970).

[11] *People v. Smith*, 338 N.E.2d 207 (Ill. App. 1975); *People v. McIntyre*, 324 N.E.2d 322 (NY 1974).

The ease with which an ineffective assistance claim can propel a prisoner into a course of collateral federal review makes clear the problem is large enough when review of attorney error is limited to such claims. The too common result of habeas review of ineffectiveness claims is illustrated by the Court of Appeals' illuminating observation in *Briley v. Bass*, 750 F.2d 1238, 1247 (4th Cir. 1984):

> The conduct of petitioner's trial co-counsel . . . has been extensively reviewed by both the Virginia state courts on collateral attack, with the benefit of an evidentiary hearing, and by the magistrate at the district court proceedings below, and *none of these reviewing authorities have found counsel to have been inadequate to their task. Nevertheless, we have undertaken our own review of the record in light of the numerous allegations of ineffective assistance presented by petitioner, and we find those allegations meritless.* (Emphasis added.)

Clearly enough, expanding the availability of federal habeas review to claims of attorney error falling short of Sixth Amendment violations would present a nearly insurmountable obstacle to the goal of affording maximum deference to state court judgments.

The impact of such a rule would be particularly devastating for those states with capital punishment laws. As is well known, strategies of delay, facilitated by filing successive petitions for federal habeas review, are commonly pursued in these cases. *See, e.g., Evans v. Bennett*, 440 U.S. 1301 (1979) (opinion in chambers), and it seems unlikely that the abuse of process provision of Rule 9(b), *Rules Governing Section 2254 Cases*, authorizing dismissal of successive petitions, would be held to bar a claim previously defaulted for cause, even if "cause" could be prac-

tically anything. The Court of Appeals' decision unwisely affords counsel bent on delaying capital cases, or others, an impressive opportunity.

The Court of Appeals' decision also ignores an important distinction drawn by the Court between errors of counsel having constitutional importance and those deemed not to justify relief from their consequences.

It was argued in *McMann v. Richardson,* 397 U.S. 759 (1970), that a plea of guilty was involuntary if it was the result of counsel's miscalculation about the admissibility of allegedly coerced confessions, as affected by a subsequent change of law. The Court rejected the argument, pointing out that a decision by a counseled defendant to plead guilty must be based on judgments of counsel that cannot be reliably certain about the future course of the law or how a court might view given facts. The Court's observation respecting the weight to be given counsel's judgments that do not fall short of the Sixth Amendment standard is particularly significant in the present context:

> It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; *further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.* 397 U.S. at 774. (Emphasis added.)

See also Parker v. North Carolina, 397 U.S. 790 (1970).

The assumed risk holding of *McMann v. Richardson* has been most commonly applied according to the relatively narrow principle that a counseled defendant pleading guilty, and thereby knowingly waiving and forfeiting a number of rights and procedural advantages, assumes the risk that the decision to do so may be affected by counsel's

ordinary errors in assessing the law and facts applicable to the case.[1]

Nevertheless it is consistent with this Court's limitations on the availability of federal habeas relief to consider procedural defaults of counsel falling short of ineffective assistance to be ordinary error, the consequences of which may fall upon the defendant without any affront to fairness or accuracy. In *Cooper v. Fitzharris,* 586 F. 2d 1325 (9th Cir. 1978), the Court of Appeals for the Ninth Circuit viewed the "assumed risk" holding of *McMann v. Richardson* as following logically from the fact that "the Constitution does not guarantee representation that is infallible." 586 F.2d at 1325. Nor does the Constitution guarantee that every legal issue or investigative step that might come to mind will be pursued by counsel:

> If given an unrestricted budget and freed of any constraints as to probable materiality or accountability, a lawyer might have cheerfully logged in many hours looking for the legal equivalent of a needle in a haystack. As already noted, a millionaire might have retained counsel to leave not a single stone unturned. However, a defendant is not entitled to perfection but to basic fairness. *United States v. DeCoster,* 624 F. 2d 196, 211 (D.C. Cir. 1976).

It would hardly encourage effective legal representation to base a right to pursue federal relief on "ordinary

---

[1] *Harris v. State,* 367 So.2d 524 (Ala. Cr. App. 1978); *Mitchell v. State,* 609 S.W.2d 333 (Ark. 1980); *Bettis v. United States,* 325 A.2d 190 (D.C. 1974); *Dees v. State,* 492 S.W.2d 849 (Mo. App. 1973); *State v. Alvarez,* 177 N.W.2d 591 (Neb. 1970); *Mathis v. Warden,* 471 P.2d 233 (Nev. 1970); *Commonwealth v. McCloud,* 458 A.2d 219 (Pa. Super. 1983); *State v. Butler,* 564 P.2d 828 (Wash. App. 1977), *reh'g denied* (1977).

error" or on decisions of counsel that may have the appearance of such error. Counsel's ability to persuade a jury, a trial judge or an appellate court often depends greatly on separating important matters from those whose only office is to draw attention away from what is significant. "A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." *Jones v. Barnes,* 463 U.S. 745, 753 (1983). Furthermore, counsel has no duty to raise every nonfrivolous argument on appeal. *Id.* The Court of Appeals' holding is at odds with this principle. Counsel's omission to raise a constitutional issue below barred a course of federal review of nothing more than counsel's judgment or error on a matter having little potential for success on the merits.

The Court of Appeals' invitation to federal habeas courts to inquire into attorney errors of lesser magnitude than ineffective assistance of counsel elevates such errors to a level of constitutional importance. A finding that counsel omitted to pursue a remedy for nondisclosure could be cause, even though the underlying constitutional claim would not meet the standard of materiality necessary to justify federal relief. In short, the rule is one that would require federal habeas courts to entertain clearly unmeritorious claims.

In this Court's cases involving the evaluation of claimed constitutional error, the focus has consistently been upon the justice of the result. Accordingly, in *United States v. Agurs,* 427 U.S. 97 (1976), the Court held that the state's failure to disclose a murder victim's prior criminal record that would arguably have furnished evidence

of his violent character, supporting a defense theory of justification, was not constitutionally material. The standard of materiality was to reflect the Court's "overriding concern with the justice of the finding of guilt." 427 U.S. at 112. The Court pointed to the cumulative nature of the undisclosed evidence, its incongruity, and the circumstance that it did not contradict the state's evidence, holding that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.*

A comparable view of the significance of reliability of the trial result in evaluating claims of constitutional error occurs in *Harrington v. California,* 395 U.S. 250 (1969), where a confrontation clause violation was harmless error because the strength of the case against the defendant was overwhelming, leaving no reasonable doubt of the reliability of the result, and in *Milton v. Wainwright,* 407 U.S. 371 (1972), where a *Massiah* violation was harmless error because the evidence independent of that erroneously admitted made out an overwhelming case of guilt.

The Court of Appeals characterized Carrier's underlying constitutional claim as an error by the trial judge in incorrectly applying the due process standards of *Brady v. Maryland,* 373 U.S. 83 (1963), and *Agurs* when he refused a request for discovery of the rape victim's statements to police because they contained nothing exculpatory. 724 F.2d at 399. The correct standard, in Carrier's view, was whether the specifically requested evidence "was 'material to guilt,' *Brady,* 373 U.S. at 87, not whether it was exculpatory." *Id.*

The importance of this distinction is significantly diminished by the Court's opinion in *Agurs,* where no con-

stitutionally meaningful difference between exculpatory evidence and evidence of the *Brady* variety was noted. In its discussion of *Brady* the Court equated *Brady* requests with requests for the disclosure of exculpatory evidence:

> In many cases . . . exculpatory information in the possession of the prosecutor may be unknown to defense counsel. In such a situation he may make no request at all, or possibly ask for "all Brady material" or for "anything exculpatory." . . . Whether we focus on the desirability of a precise definition of the prosecutor's duty or on the potential harm to the defendant, we conclude there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request. 427 U.S. at 106-107.

Thus, the Court of Appeals' holding is to the effect that the omission of counsel to pursue the disclosure issue on appeal is cause to place before a federal court nothing more than a dispute over whether there is a difference between exculpatory evidence and evidence "material to guilt," and this in the face of reason to believe there is not. Last term the Court held that undisclosed evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley,* No. 84-48, slip op. at 14 (July 2, 1985). Constitutional error in these circumstances is that which creates the possibility of a miscarriage of justice. Significance of this point escaped the Court of Appeals. It is just the kind of default exemplified by this case that this Court can well afford to treat as final in view of its concern with the connection between constitutional error and the reliability of a finding of guilt.

It is counsel's constitutional responsibility to perform according to the requirement that the proceeding be genuinely adversarial. When counsel's representation meets this expectation there can be confidence in the reliability of the result. *Strickland v. Washington, supra.* Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 80 L.Ed.2d at 692-693. This view of the constitutional basis of the right to effective assistance of counsel not only defines a right to a certain standard of conduct, it also limits the availability of federal relief to those cases falling outside that standard. The limitation is rendered meaningless by the Court of Appeals decision that, notwithstanding the Sixth Amendment limitations on the right to relief from the conduct of counsel, federal relief may be available on another theory for those omissions of counsel not considered sufficient to diminish confidence in the reliability of the trial result.

Although the right to the assistance of counsel is an element of basic fairness within the contemplation of the due process clause of the Fourteenth Amendment, *Powell v. Alabama,* 287 U.S. 45 (1932), the inquiry into what standards counsel must meet beyond the threshold due process right has been a matter of Sixth Amendment analysis. *Strickland, supra.* The Court of Appeals' decision effectively creates a due process right to effective assistance of counsel that is more expansive than that occurring under the Sixth Amendment. There is certainly no warrant in this Court's cases for this tortured result, and nothing to commend it as a matter of legal policy.

The cases establish that it was not the Court's intent either to define errors not likely to undermine confidence in the reliability of the trial outcome as constitutionally significant or to establish a right to federal review of lesser attorney errors. The decision of the Court of Appeals leaves no procedural bar and invites a proliferation of spurious claims. As the Court has said:

> The availability of intrusive postrial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. *Strickland,* 80 L.Ed.2d at 695.

Notwithstanding the circumstance that "ineffectiveness claims have become regrettably common," *Bettis v. United States,* 325 A.2d at 196 (D.C. 1974), they amount to stigmatizing assertions that counsel is not professionally reliable. Attorneys resent these claims, and those with the most to lose from being victimized by them, the most experienced and respected members of the bar, will be the quickest to distance themselves from criminal cases if it becomes any easier to subject counsel to a course of federal litigation on the subject of their representation of defendants. The Court of Appeals gave no consideration to this problem, but we think it another important argument against its holding.

A most significant reason for approaching the question of expanding the availability of federal habeas relief with greater caution than that exercised by the Court of Appeals is that facts related to the conduct of counsel

generally do not appear of record in the trial where the constitutional error assertedly occurred. The problem of reconstructing the facts is a serious one. "The motives of the defendant who may be pressed for a viable claim are more suspect as time goes on, and the ability of the parties and the court to later reconstruct anything like a reasonable facsimile of what actually happened dissipates." Strazella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems,* 19 Ariz. L. Rev. 443, 463 (1977).

More generally, it must be expected that collateral attacks on state criminal judgments are susceptible to the substantial risk that not all facts necessary to accurately resolve the dispute will be placed before the federal courts even if the information is available.

One writer has suggested that the decision in *Miller v. Pate,* 386 U.S. 1 (1967), was based on a factual error. M. Fleming, *The Price of Perfect Justice,* 31-35 (1974). In *Miller,* the Court overturned an Illinois murder-rape conviction in the belief that the prosecutors conducting the case had deliberately misrepresented to the jury that a paint-stained pair of shorts was bloodstained. Following the decision, the Grievance Committee of the Illinois State Bar Association conducted an extensive ethics investigation into the charge of deliberate misrepresentation. It reported that:

> At the trial, which took place in 1956, the State chemist testified that there *were* bloodstains on the shorts in question. Prior to the trial, the prosecutors had been given a laboratory report from the Illinois State Bureau of Criminal Identification which disclosed that the shorts did, in fact, contain blood. The State chemist further testified at the trial that the blood on the shorts was type "A" which was the same type as that of the victim. 56 Ill. Bar Jn'l 955, 956 (1968).

It is likely that federal habeas proceedings will be conducted by counsel who did not participate in the prisoner's state trial. The record of the case will often be the product of multiple state proceedings and may be very voluminous. The record may be only partial, by design of state appellate counsel or by omission, and it may not be readily apparent that this is so. Federal collateral review thus contains a built-in mechanism for attenuating the facts of the case. This risk to the accuracy of factual determinations, inherent in all collateral review, becomes more pronounced as the conduct to be reviewed becomes more trivial.

By contrast, the record placed before a federal habeas court on a claim that a prisoner was denied *any* meaningful representation, *Powell v. Alabama*, *supra*, is likely to be factually complete. It is easy to discern the most obvious failures of justice, and at all stages preceding the petition for federal habeas corpus they will have been the focus of everyone's attention. On the other hand, if the omission of counsel offered as "cause" to bypass a procedural default was the failure to make a contemporaneous objection or, as here, the failure to preserve an issue for appellate review, the question may be arising for the first time in federal court. If there are facts of record bearing on the claim, they may never have been transcribed because the issue was not a part of any state proceeding. Or, if the facts respecting counsel's conduct must be developed for the first time in federal proceedings, it may be necessary to do so many years after the relevant facts have faded in the memories of the principal participants. The Court of Appeals view that lesser errors may constitute "cause" under *Sykes* exacerbates a problem that is serious enough without any amplification.

Past experience, as well as empirical evidence mentioned earlier, makes it clear that the attainment of justice does not hinge on expanding the availability of federal habeas corpus relief. No good reason was advanced by the Court of Appeals that would support a conclusion that federal review of minor errors of counsel would contribute in the slightest degree to the fairness of reliability of determinations of guilt in criminal cases. This kind of review is essentially superfluous and its costs are great, as a former Assistant Attorney General of the United States has observed:

> Conviction in the state courts now has become merely the starting point of interminable litigation. State appeals are followed by successive petitions for federal habeas corpus and successive federal appeals. What is involved is a repetitious, indefinite, costly process of judicial screening, rescreening, sifting, resifting, examining and reexamining of state criminal judgments for possible constitutional error. . . . No other nation in the world has so little confidence in its judicial systems as to tolerate these collateral attacks on criminal court judgments. . . . This comparatively new concept of federal habeas corpus has dangerously prejudiced the delicate balance of federal-state relations and has seriously degraded the authority of the states and their judicial tribunals. Doub, *The Case Against Modern Habeas Corpus,* 57 Am. Bar Ass'n Journal, 323, 326 (1971).

II.*

The Inquiry Into Whether There Is Cause for a Procedural Default Should Be First Undertaken by State Courts.

The Court of Appeals bypassed the Virginia state courts in considering the "cause and prejudice" issue with the remark that "[t]he exhaustion requirement of 28 USC § 2254 pertains to independent claims for habeas relief,

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*The States of Alabama, Connecticut, Georgia and Illinois do not join in this section of the brief.

not to the proffer of *Wainwright* cause and prejudice." 724 F.2d at 402. Thus, as the court viewed it, a petition containing both a claim of attorney error constituting cause to overcome the *Sykes* bar and a separate claim of ineffective assistance of counsel would be subject to remand to state courts only if the ineffectiveness claim were unexhausted.

In *Rose v. Lundy,* 455 U.S. 509 (1982), the Court held that considerations of federalism dictated that state courts have the first opportunity to pass on claims of constitutional error. The Sixth Circuit Court of Appeals concluded in *Alcorn v. Smith,* 724 F.2d 37 (6th Cir. 1983), that these considerations compelled the conclusion that the cause issue was subject to the exhaustion requirement.

This question substantially overlaps the concerns addressed earlier. For the reasons expressed in Part I of this brief, the Court should conclude that considerations of federalism argue against exceptions to the exhaustion rule that would broaden the availability of federal collateral review.

The decision of the Court of Appeals deprives the exhaustion rule of much of its force. A purpose of the exhaustion requirement was to permit state courts the first opportunity to pass on matters affecting the protection of the accused's federal constitutional rights. *Rose v. Lundy, supra.* Applying the Court of Appeals' decision, this purpose is to be overlooked on a question of cause. No good reason was advanced in support of this

precept. To the contrary, the reasons for comity apply as much to the "cause" determination as to any other issue on which federal courts are to await the judgment of state courts. State rules of procedure often afford relief from procedural defaults, as is the case in Virginia. The Court of Appeals has furnished no compelling reason why a habeas petitioner should be permitted, at his option, to proceed directly to federal court without ever presenting his "cause" to the state judiciary. If Carrier had presented his cause claim to the Virginia courts and succeeded in having his underlying constitutional claim considered, either there would have been no occasion for federal intervention or federal review would at least have been accompanied by a state court's consideration of the constitutional issue based on a view of the facts from one step closer to the relevant occurrences.

The decision below builds into the law an advantage which could actually encourage counsel to default procedurally in order to bypass state courts likely to be more familiar with the factual and procedural background of the case. The benefit to a defendant without a meritorious claim is obvious. It is also obvious that conferring such a benefit is a detriment to the truth-seeking function of the law.

In addition, every time a federal court refuses to await the exhaustion of state remedies it contributes to the perception that it is inevitable there will be a second run in federal court through all of the issues that have been or should have been litigated in the state courts, where the primary responsibility for enforcing state criminal law rests. It is a reflection of this fact that frequent efforts have been made by states to waive the exhaustion

requirement on the theory that if a constitutional issue must always be litigated in federal courts one might as well begin there. *Cf. Houston v. Estelle,* 569 F.2d 372 (5th Cir. 1978) (state waiver of exhaustion accepted); *Naranjo v. Ricketts,* 696 F.2d 83 (10th Cir. 1982); *Sweet v. Cupp,* 640 F.2d 233 (9th Cir. 1981); *United States ex rel. Trantino v. Hatrack,* 563 F.2d 86 (3d Cir. 1977), *cert. denied,* 435 U.S. 928 (1978) (state waiver of exhaustion not authorized).

If the decision of the Court of Appeals is allowed to stand, it will obviously undermine this Court's emphasis on the principle of deference to state court judgments.

CONCLUSION

The Court of Appeals' expansion of the availability of the writ of habeas corpus in federal courts is not only unnecessary, it is an unwarranted expansion of this Court's cases and lays the groundwork for greater and costlier intrusions into the law enforcement functions of state courts. Public confidence in the ability of both the federal and state judicial systems to uphold the law is undermined by the perception that criminal judgments entered in state courts are rarely final. Yet, the extensive opportunities for federal collateral review result in relief in only the rarest cases, suggesting that much of such review is wasted effort. The conflict between state and federal institutions, intrinsic in the process of federal collateral review, is magnified by the failure of federal courts to give proper weight to the rule requiring exhaustion of state remedies before federal relief may be pursued.

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner,

V.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA, JOINED BY NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., URGING REVERSAL

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INTEREST OF AMICI CURIAE

The National District Attorneys Association, Inc. ("NDAA") is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. Among other

goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. LFA is located on the campus of, and shares certain personnel and activities with, the South Texas College of Law in Houston. In support of its goals, the Foundation's attorneys have frequently appeared to represent it as amicus curiae in this Court, as well as in the lower courts.

Americans for Effective Law Enforcement, Inc. ("AELE") is a national not-for-profit citizens' organization interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their lives, liberties and property, within the framework of the various state and federal constitutions. AELE has previously appeared as amicus curiae more than 60 times in this Court.

The International Association of Chiefs of Police, Inc. ("IACP"), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publication, legislative reform, and amicus curiae advocacy, IACP seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

SUMMARY OF ARGUMENT

Amici curiae anticipate that the Commonwealth of Virginia, which is represented by capable and diligent counsel, will thoroughly brief arguments centering upon the case law. Amici curiae wish to avoid unnecessary duplication of Virginia's arguments, although we agree with those arguments and wish to express support for them. Therefore, this brief instead concentrates upon issues of public policy. Further, although amici agree with Virginia's arguments regarding Respondent Carrier's failure to exhaust state remedies, this brief is confined to the other issue, concerning "cause" for setting aside state procedural rules.

The court of appeals' approach not only conflicts with the prior decisions of this Court, but would interfere with the effective discharge of the duties of the federal courts, to the disadvantage of diligent attorneys, of the citizenry, and of habeas corpus petitioners. Specifically, the court of appeals' approach would force diligent counsel to forego his own judgments concerning the withholding of objections upon marginal issues, solely to prevent the possibility that later judgments by others may result in the labeling of his conduct in ambiguous matters as a "lapse" or an "error." The result would be to emphasize the presentation of lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. As a collateral consequence, the lower court's reasoning would obliterate the distinction between competent and incompetent counsel, unfairly stigmatizing diligent attorneys.

At the same time, the court of appeals' approach would make federal habeas decisions depend upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. It would encourage abuse of the writ, contributing to the burden of less meritorious cases that makes difficult the federal courts' task of identifying truly meritorious habeas claims.

ARGUMENT

A SINGLE INSTANCE IN WHICH A FULLY EFFECTIVE AND COMPETENT ATTORNEY WITHHOLDS AN OBJECTION OR ARGUMENT SHOULD NOT FURNISH "CAUSE" TO SET ASIDE STATE PROCEDURAL RULES ON GROUNDS NOT AMOUNTING TO INEFFECTIVENESS OF COUNSEL.

The court of appeals, below, characterized the defense attorney's withholding of an issue he had fully preserved for appeal in the state system as probably involving a "momentary lapse by counsel." [1] Amici respectfully submit, instead, that the

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1 Carrier v. Hutto, 724 F.2d 396, 402 (1983). Although the court remanded for an evidentiary hearing, it persisted in the asserted

attorney's decision[2] not to detract from his brief with the extremely marginal[3] claim at issue was not a lapse (not even a momentary one), but rather was effective appellate briefing

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belief that "the likelihood of attorney error appears very great." Id. at 402. (Amici respectfully disagree for reasons set forth infra in notes 3-4.)

2 Counsel actually specified the issue in the state appellate court in his allegations of error. If he had failed to object or specify the issue, inadvertence might be a possibility. A mistake is exceedingly unlikely, however, when counsel has not only objected, but has actually specified the error to the appellate court. Thus amici submit that the probability of deliberate, tactical choice is overwhelming, contrary to the court of appeals' opinion. That choice was wise, for reasons set forth infra in notes 3-4.

3 As the dissenting judge said in the court of appeals, "It is highly unlikely that a valid Brady claim can be drawn from this case." 724 F.2d at 404.

The Brady line of cases requires disclosure of evidence that is "favorable" or "exculpatory." E.g., United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). See also United States v. Bageley, 53 U.S.L.W. 5084, 5086-88 (U.S.S.Ct. July 2, 1985) (citing Brady requirements of "favorable" and "material" evidence; defining materiality as existing "only if there is a reasonable probability that . . . the result of the trial would have been different"). Respondent Carrier's claim, however, is that disclosure should be required under Brady whenever the information is merely "material" to guilt, even if it is not favorable or exculpatory at all. This argument is the claim Carrier now seeks to press. 724 F.2d 396, 399 (1983) (citing Carrier's argument); Respondent's Memorandum in Opposition to Petition for Certiorari at 2 (unprinted version). It is readily apparent that an experienced appellate lawyer would not have asserted this argument if he had any other arguments with any merit at all.

It is surprising that Carrier has argued "boldly," in the words of the dissenting judge, ". . . that he lost a 'sure thing' reversal." Id. at 405. He "lost" no such thing. Instead, again in the words of the dissenting judge, this extremely marginal claim was wisely not argued because "counsel undoubtedly recognized it as a weak issue." Id.

guided by the sound judgment of an experienced advocate.[4] Competent counsel would not file a brief with numerous less persuasive issues that might interfere with consideration of more persuasive ones. Instead, skillful counsel would do as counsel here did: He would select, from among those issues preserved for appeal, those few arguments that he considered most persuasive.[5]

Nevertheless, for purposes of this argument, amici will argue the issue as framed by the court of appeals. We assume, although convinced it is not this case, a case in which counsel has engaged in a "momentary" lapse through "inadvertence," and has therefore not objected to or briefed one among many issues, although counsel has rendered effective representation overall that has fully satisfied the sixth amendment.[6]

For the reasons that follow, amici submit that the existence of a momentary lapse by effective counsel should not result in the setting aside of state procedural rules. Specifically, the court

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4 Even Carrier here speculates that trial counsel's decision was a "willful abandonment" of what he persists, against all indications, in calling "the winning argument." Memorandum in Opposition at 4 (unprinted version, unnumbered note). The dissenting judge correctly describes trial counsel's decision as "both tactical and wise, as counsel undoubtedly recognized it as a weak issue." 724 F.2d at 405.

Indeed, the extreme unpersuasiveness of the claim which Carrier now so pathetically argues was his one "winning" argument, is itself an indication that the decision was tactical. See supra note 3.

5 See infra notes 7-8 and accompanying text; cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982) (discussing myriad of issues at trial and holding counsel effective even though he overlooks or omits arguments).

6 The court of appeals said, in fact, that in this case, "Carrier's trial lawyer appears to have performed with diligence and skill," except for his "unexplained failure to appeal the Brady issue." That failure is not "unexplained," but is instead clearly traceable to trial counsel's sound judgment that the Brady argument was meritless. See supra notes 3-4.

of appeals' approach would create a number of harmful results, some of which are discussed in the argument that follows.

1. The court of appeals' approach would force counsel to object to marginal issues and to forego his own judgments concerning the best means of defense, solely to prevent the possibility that later judgments by others may differ on ambiguous matters and may result in the labeling of his conduct as a "lapse" or an "error." The practice of law requires judgment. Often, the choices it presents are ambiguous. Usually, there are risks associated with every available choice. For example, the inclusion of a given allegation of error may appear to increase chances of reversal if it happens to persuade the court, but if other meritorious grounds also exist, the resulting proliferation of grounds may actually detract from the force of the presentation. For this reason, basic texts on appellate advocacy advise the attorney to limit his allegations of error.[7] Similarly, books on trial techniques advise the foregoing of many objections to evidence (a judgment that must be made under ambiguous circumstances, usually within one or two seconds of the event).[8]

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7 "[T]hose who write on appellate practice are unanimously in favor of limiting the number of issues in a brief . . . ." R. Martineau, Modern Appellate Practice: Federal & State Civil Appeals 183 (1978). "Selectivity is . . . essential." R. Stern & E. Gressman, Supreme Court Practice 764 (5th ed. 1983).

After-the-fact criticism of the appellate lawyer's judgment is especially easy because, even though there is a consensus that the issues need to be limited, "there is far less agreement on how the issues should be framed." R. Martineau, supra, at 183.

8 See J. Appleman, Preparation and Trial 842 (1967) ("Counsel should never object unless he has no fear of antagonizing the jury, nor unless he has a definite reason for wanting to keep something out of the evidence and is certain that he can do so successfully); 2 I. Goldstein & F. Lane, Trial Technique sec. 13.02 (1969) ("Objections should be used cautiously . . . .").

Again, second-guessing of a diligent attorney who follows this sound advice is relatively easy.

The court of appeals' opinion would interfere with the exercise of this judgment by rewarding the decision to brief every marginal issue and make every marginal objection. If an attorney failed to make this decision, he would risk being labelled "inadvertent" and as having committed "errors" or "lapses." Of course, the attorney will not be so described if the court reviewing his client's habeas corpus petition later happens to agree with his judgment; the point, however, is that criticism of his performance is unpredictable. Both the attorney's state of mind (i.e., whether he engaged in strategy or was simply "inadvertent") and the choice itself (i.e., whether the strategy, if indeed strategy was involved, was wise) are at issue. Both must be judged in hindsight, by ambiguous indications. Indeed, a good trial attorney may himself be overly critical, in hindsight, of his *own* judgment in an individual objection or argument, even though he has tried the entire case well and indeed even though the particular choice he later inwardly questions was entirely appropriate.

As a consequence of the decision below, a diligent attorney may unfortunately be motivated by the court of appeal's reasoning to reduce such second-guessing, at his client's expense. He can easily do so by suspending his professional judgment and simply objecting indiscriminately to every item of evidence (or by suspending judgment and briefing every conceivable appellate point whether persuasive or not). The court of appeals' approach clearly encourages this behavior by counsel. Conversely, counsel who exercises professional judgment by withholding marginal objections will be penalized, even if his judgment makes him more effective in representing his client. He runs the risk that a court will later disagree with his judgment and describe the withholding of a single objection as an error even though it is clear that counsel's overall performance has been fully competent.

In a lengthy trial, an attorney may be required to make hundreds or even thousands of individual judgments concerning when to object or what to argue. *Cf. Engle v. Isaac*, 456 U.S. 107, 134-35 (1982). It is no more appropriate to characterize such an individual judgment as a "lapse" or "error" than it is to similarly criticize a skilled tennis player who hits a single ball

into the net during a lengthy match. While a skilled tennis player could act with an excess of caution, making sure above all else that he hit no balls into the net, he would do so at great cost to his strategy and to his effectiveness in the contest. He would necessarily forego hard-hitting, vigorous strategies having any risk at all. The same would be true of an attorney who suspended his judgment and concentrated on presenting every objection or argument, irrespective of relative merit.

2. *The court of appeals' approach would unfairly stigmatize loyal and competent counsel.* The court of appeals' approach effectively obliterates the distinction between competent and incompetent counsel, by its unrealistic treatment of the judgments that competent counsel inevitably must make in trials. The most unfortunate direct effect of the lower court's opinion may be the stigma it places upon well prepared, skillful, and loyal defense counsel.[9] In this case, the defense attorney has been publicly determined by a federal appellate opinion to have in "great likelihood" committed an error affecting the defense of his client, owing to his probable "inadvertence." Even though amici submit that trial counsel acted appropriately and indeed skillfully in this choice, amici reluctantly conclude that he would be well advised to notify his malpractice insurance carrier of the court of appeals' characterization. Furthermore, he may well be required to disclose the court of appeals' evaluation of his performance upon applications for certification as a specialist in some States, or even in applications for admission to courts.

Such characterizations understandably prompt resentment in many competent practitioners. They contribute to a climate in which able lawyers often decline to engage in the important public service of criminal defense.[10] If counsel were indeed in-

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9 As one prominent Texas attorney has said in another context, such unfair treatment "will cut you to pieces . . . to such an extent that you will be quite angry, and it only has to happen to you one time and you will never take another criminal case." Speech by Luther Jones, quoted in Crump, The Functions and Limits of Prosecution Jury Argument, 28 S.W. L. J. 505, 537-38 & n.222 (1974).

10 See supra note 9.

effective, the label would be appropriate, and in that event its application would be justified by the interest in appropriate adjudication of constitutional claims. When, however, it reflects a single choice in a competently conducted trial in which many such choices were required, the stigma is not only unfair but is excessively costly to the criminal justice system.

3. The court of appeals' approach inappropriately encourages the perception in criminal defendants that their convictions are due primarily to failures of their attorneys. Few trials are perfect, but most are fair. Characterization of the outcome as dependent upon a momentary lapse of counsel, rather than as the result of a fair trial, converts acceptance of responsibility by a convicted defendant for his offense into blame for the system and defense lawyer that "caused" him to be convicted. The result is lessened respect for the criminal justice system and encouragement of abuse of the writ.

4. The court of appeals' approach tends to emphasize lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. By identifying and selecting for review those issues that counsel, at trial, failed or declined to preserve through "inadvertence," the court of appeals' approach tends to cause less significant issues to occupy the attention of federal courts hearing habeas corpus claims. Almost by definition, an issue that fully competent counsel has failed or declined to raise because of "inadvertence" is likely to be an issue of lesser significance than other issues, in the determination of his client's guilt or innocence. Ironically, it is precisely such less significant issues that the court of appeals' reasoning would most encourage to be presented in petitions for habeas corpus.[10a]

Furthermore, the court of appeals' "inadvertence" test encourages the taking of the grounds of error out of context,

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10a Amici curiae submit that the present case involves precisely such a situation. The omitted argument was omitted because it was insubstantial. See notes 1-4 supra.

divorced from such considerations as the length of the trial, the presence of other significant issues, and the importance of the ground in light of the remainder of the evidence. State procedural rules operating contemporaneously have a healthy tendency to motivate counsel instead to emphasize those matters that counsel considers most important to the determination of the guilt or innocence of the accused.

In this regard, the court of appeals properly recognized that "sandbagging" was *one* concern underlying *Wainwright v. Sykes, supra.* But the court of appeals failed to recognize that sandbagging is *not* the *only* such concern. *E.g., Stone v. Powell*, 428 U.S. 465 (1976) (federal habeas review of litigated fourth amendment issue not available, even though no sandbagging). *Sykes*, as well as *Engle v. Isaac, supra*, are properly understood as having the more general goal of concentrating habeas corpus upon the most deserving cases.[11] Thus numerous commentators have recognized that the bar extends to situations of inadvertence, because they have recognized that sandbagging is not the only concern.[12] Sim-

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11 Sykes, supra, itself lists many other reasons that may underlie a contemporaneous objection rule, including dealing with the matter while memories are fresh, deferring to the trial judge who could assess demeanor, contributing to finality, comity concerns, encouraging sound performance by trial counsel, and inducing the prosecutor to contemplate the error.

Sykes rejects the "sweeping language" of Fay v. Noia, 372 U.S. 391 (1963), particularly its "knowing-and-deliberate waiver rule which applied . . . to individual failures to raise individual substantive objections . . . ." 433 U.S. at 87-88 & n.12. The court of appeals has ignored this language in Sykes and resurrected the rejected "sweeping" approach of Fay and its progeny. Henry v. Mississippi, 379 U.S. 443 (1965), Townsend v. Sain, 372 U.S. 293 (1963).

12 E.g., Note, Habeas Corpus: The Supreme Court Defines the Wainwright v. Sykes "Cause and Prejudice" Standard, 19 WAKE FOREST L. REV. 441, 461-62 (1983); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, 126 U. PA. L. REV. 473, 508-09 (1978); cf. Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 466 & n. 190 (1980); Goodman & Sallett, Wainwright v. Sykes: The Lower Courts Respond, 30 HASTINGS L. J. 1683, 1717-1719 (1979).

ply put, a standard encouraging habeas filings, precisely *because* an issue was so insignificant that defendant's attorney was inadvertent to it, would have the topsy-turvy result of emphasizing habeas review of weak claims (such as the one in this case) rather than significant ones.

5. The court of appeals' approach would make habeas decisions depend heavily upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. Straight sixth amendment claims of ineffective assistance of counsel are themselves often extraordinarily difficult to determine, even though the standard is an ostensibly objective one, and the trial transcript itself is usually the principal evidence by which the issue is determined.[13] By comparison, the determination required by the court of appeals' reasoning in this case would be far more difficult. To isolate a single choice by counsel, and determine whether it was the result of an inadvertent, momentary lapse as opposed to a reasonable choice (even though falling within the range contemplated by the sixth amendment), would require the court to probe the attorney's subjective mental state at the evanescent moment of the event. In *Strickland, supra* note 13, 104 S.Ct. at 2066, this Court was concerned that "Criminal trials resolved unfavorably to the defendant would increasingly be followed by a second trial, this one of counsel's unsuccessful defense." That effect would be magnified many times if the decision below were to stand.

The most relevant witness is likely to be the defense attorney himself, who will be dependent upon his recall of his thoughts at the time of one choice among many made during a contested trial. A candid response might put the defense attorney in the position of stating that while he does not fully remember his thoughts at the time, he believes that he made a correct tactical choice, but that there were matters he did not consider,

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13 Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984).

Claims of ineffective assistance of counsel are among the most frequent grounds asserted in habeas corpus petitions, and among the most abusively asserted.

that time pressure affected the quality of the decision, that subsequent events have shown the matter to be more (or less) important than he thought at the time, and that the attorney was not then and is not now absolutely certain his choice was appropriate in any event. Such a scenario could apply easily in a case such as the present one. The court of appeals' glib characterization of such an action as presenting "great likelihood" of an error due to lapse or inadvertence conceals what is actually a complex fact finding by the court, made under a standard that is itself ambiguous.

Criminal convictions should not depend on such unreliable and subjective factors in the mind of counsel. *Strickland, supra.* They should instead depend upon an objective appraisal of the adequacy of counsel's performance. Nor should the valuable efforts of federal courts be channeled into inquiries likely to give such unproductive and inconsistent results.

6. The court of appeals' approach would decrease the ability of the federal courts to adjudicate meritorious habeas corpus claims. The sheer number of federal habeas corpus filings has been the subject of frequent commentary.[14] Habeas increases have been further augmented by enormous increases in other state prisoner petitions, particularly mandamus and 1983 claims; prisoner petitions now are 12% of federal dockets.[15] The habeas corpus docket includes cases of significant complexity; for example, capital cases invariably require extensive habeas scrutiny. Such cases often require delays on the order of a

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14 See, e.g., Allen, Schachtman & Wilson, Federal Habeas Corpus and Its Reform: An Empirical Analysis, 13 RUTGERS L. J. 675 (1982); BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEDERAL REVIEW OF STATE PRISONER PETITIONS—HABEAS CORPUS 1 (1984) (citing "dramatic increase (almost 700%) in habeas corpus petitions in the past 20 years").

15 BUREAU OF JUSTICE STATISTICS, supra note 14, at 2-3. While strict habeas filings have remained at a fairly constant level over the last decade, this entire category of prisoner petitions is the relevant category and has increased significantly.

decade for resolution, and they generate complex collateral questions such as the grant or denial of stays. Even with the inclusion of such serious cases (which presumably exhibit a much higher percentage of relief granted), the proportion of habeas corpus cases in which any kind of release results is exceedingly small.[16] The effort to identify meritorious claims amounts to a search for a needle in a haystack, and that is true even if the courts are not saddled with the disadvantages of the decision below.

Because the decision below would encourage abuse of the writ, it would have a negative impact upon the federal courts' ability to deal with this problem. That effect would be aggravated by the dependence of the outcome upon close issues regarding attorneys' states of mind, as well as by the tendency to emphasize lesser issues of the kind that counsel might overlook through inadvertence.

CONCLUSION

The decision of the court of appeals should be reversed. For the reasons stated by Petitioner Commonwealth of Virginia, the decision below is inconsistent with this Court's prior decisions and is particularly inconsistent with *Wainwright v. Sykes.* In addition, as this amicus curiae brief indicates, there are sound policy reasons for reversal, including the conclusion that the court of appeals' reasoning would cause significant harm while interfering with the fundamental purpose of habeas corpus jurisdiction.

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16 Allen et al., supra note 14, at 694 (1.7% released); BUREAU OF JUSTICE STATISTICS, supra note 13, at 5 (1.8% released). These rates indicate that emphasis on less meritorious cases will reduce attention in meritorious ones, and standards, such as that set by the court of appeals, will actually be counterproductive in that they will decrease the probability of release in the most meritorious cases.

Respectfully submitted,

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NO. 84-1554

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1984

ALLYN R. SIELAFF, Director,
Virginia Department of Corrections,

Petitioner,

vs.

CLIFFORD W. CARRIER ,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

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QUESTION PRESENTED

THIS COURT SHOULD REJECT COUNSEL'S INADVERTENCE OR OVERSIGHT AS CONSTITUTING CAUSE WITHIN THE MEANING OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) AND SHOULD GIVE DEFINITION TO THAT TERM FOR THE BENEFIT OF THE BENCH AND THE BAR.

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This brief is submitted by the State of Florida in support of the Petitioner, Allyn R. Sielaff.

INTEREST OF AMICUS CURIAE

The State of Florida, in the administration of its criminal justice system, has found it essential to employ what has become known as the contemporaneous objection rule to insure the integrity of its judicial system and to promote the finality of its judgments and sentences. To that end, Florida has vigorously sought to defend the viability of that principle of law in this Court. Wainwright v. Sykes, 433 U.S. 72 (1977).

The decision rendered by the United States Court of Appeals for the Fourth Circuit in the case of Carrier v. Hutto, 724 F.2d 396 (4th Cir. 1984), affirmed on rehearing, Carrier v. Hutto, 754

F.2d 520 (4th Cir. 1985), cert. granted sub. nom., Sielaff v. Carrier, 53 U.S.L.W. 3911 (1985), if sustained, would lead to the emasculation, if not the destruction, of that rule and render judgments and sentences imposed by the courts of the State of Florida vulnerable to attack in the federal district courts through the writ of habeas corpus.

Florida's interest in the integrity and finality of its judgments and sentences, both past and future, cannot be questioned and it believes that an adverse ruling in this cause would have a profound and adverse impact upon its entire criminal justice system.

SUMMARY OF ARGUMENT

The State of Florida, as amicus curiae, strenuously submits that this Court must repudiate the lower tribunal's employment of the "inadvertence of counsel" or "oversight" theory as a vehicle for reaching the merits of defaulted claims heretofore rendered unreviewable by the Sykes-Engle doctrine. In so arguing, the State of Florida urges this Court to overrule Fay v. Noia, infra, and suggests that it provide the bench and bar with a workable definition of "cause" tailored to serve the legitimate demands of justice while giving due, albeit equal, deference to the rights of the accuser as well as the accused.

Essentially, the State of Florida

maintains that anything less than this Court's unequivocal rejection of the lower court's efforts to equate inadvertence of counsel with "cause" for purposes of excusing a state prisoner's procedural default would vitiate the long awaited and enthusiastically received remedial measures this Court afforded the several states through its decisions in Wainwright v. Sykes, infra, and Engle v. Isaac, infra. Indeed, any other result reached by this Court would herald a return to the havoc spawned by Fay--the egregious erosion of the finality of state criminal judgments and sentences--and would once again transform Justice Harlan's incisive dissent therein into a prophecy fulfilled.

It is precisely this potential for irreparable damage to the administration of justice on the state level that compels this Court to abate the seemingly relentless attempts to circumvent the Sykes-Engle doctrine by overruling Fay in no uncertain terms, and by promulgating criteria properly constituting cause within the meaning of Sykes-Engle.

ARGUMENT

In Fay v. Noia, 372 U.S. 391 (1963), this Court, in a sharply divided opinion, held that a claim not raised and disposed of in a state court criminal proceeding in accordance with legitimate procedural requirements could be presented and considered unless the State could demonstrate that the petitioner "knowingly and intelligently" relinquished the right asserted.

Justice Clark, in a short but concise dissent, expressed grave concerns regarding the impact Fay would have upon the finality of state court judgments. 372 U.S. at 445-447. He succinctly stated:

> . . . the effective administration of criminal justice in state courts receives a staggering blow. Habeas

> corpus is in effect substituted for appeal, seriously disturbing the orderly disposition of state prosecutions and jeopardizing the finality of state convictions in disregard of the states' comprehensive procedural safeguards which, until today, have been respected by the federal courts. Essential to the administration of justice is the prompt enforcement of judicial decrees. After today state judgments will be relegated to a judicial limbo, subject to federal collateral attack--as here --a score of years later despite a defendant's willful failure to appeal . . .

372 U.S. at 446.

Justice Harlan, in a brilliant dissenting opinion in which Justices Clark and Stewart concurred, forewarned what would result from the rule announced in the majority opinion authored by Justice Brennan. 372 U.S.

at 447-476. Indeed, he recognized that to carry the principle of Fay ". . . in full force to cases in which a defendant is represented by counsel not shown to be incompetent is to undermine the entire representational system . . . and that under this approach, there could never be a binding waiver, since only an incompetent would give up a right without any good reason, and an incompetent cannot make an intelligent waiver . . ." Id. at 471-472. He also opined, correctly as subsequent history demonstrates, that the ". . . effect on state procedural rule, may be disastrous . . ." Id. at 472. Interestingly, the hypothetical example he used to demonstrate the vice of Fay, id. at 463, came before this Court in Francis v.

Henderson, 425 U.S. 536 (1976).

Justice Stewart's majority opinion in Francis affirmed the denial of a writ of habeas corpus because of non-compliance with Louisiana's procedural rules over Justice Brennan's dissent based on Fay, supra. Six members of this Court recognized that the enforcement of federal procedural requirements in federal criminal trials entitled the states to no less under Younger v. Harris, 401 U.S. 37 (1971). Francis, supra, at 541, 542. Justice Harlan was vindicated by Francis although it went unnoticed by the casual reader and many federal inferior courts.

In Estelle v. Williams, 425 U.S. 501 (1976) the Court, in an opinion authored by the Chief Justice, speaking

for six Justices, reversed the Court of Appeals' grant of the writ because the defendant failed to timely object in the state trial court to being tried in prison garb. That case made it clear that the broad language in Fay was suspect and Fay's days were numbered. Justice Brennan again dissented on the basis of Fay. It was obvious to anyone familiar with federal habeas corpus that Fay had indeed wreaked havoc with the finality of state court judgments and sentences and the administration of justice in state courts. State courts felt obligated to ignore their own contemporaneous objection rules in an effort to adjudicate claims in their own forums rather than in federal forums years later. To be sure, Justice Clark's

and Justice Harlan's predictions, ignored by the majority in Fay, were by this time totally and completely appreciated by those affected by the full impact of Fay's scope and breadth.

Wainwright v. Sykes, supra, building upon Estelle and Francis, finally restored the balance by establishing the integrity and legitimacy of the contemporaneous objection rule employed by most jurisdictions. While the Court created the "cause" and "prejudice" test--which was no more than the "exceptional circumstance" doctrine that existed prior to Fay--no definition of "cause" was provided. It is apparent that the Court did not want to establish a rule which might prove inflexible or unduly narrow given our incapacity to predict all

conceivable circumstances. What was important in Sykes, however, was the recognition that the protection of the defendant's rights rested with counsel and that the defendant was bound by the acts of competent counsel. It also recognized that it was totally unrealistic to require a "knowing and intelligent" waiver from the defendant personally on most matters, particularly those that must be raised during the course of the trial. Burger, C. J., 433 at 93 and Stevens, J., 433 at 95. See also, Estelle, supra, at 512. These were the identical points stressed by Justice Harlan in his dissent in Fay.

In all too many instances Sykes was ignored or avoided but, more importantly, efforts were made to emasculate its

salutory effect. The "futility doctrine", a novel argument indeed, met with success in the lower federal courts only to have this Court correctly repudiate it as a legitimate basis for cause.[1] Engle v. Isaac, 456 U.S. 107 (1982). The "novelty doctrine" emerged and gained limited acceptance in the plurality opinion rendered in Reed v. Ross, 468 U.S. ___, 82 L.Ed.2d 1 (1984) principally because Justice Powell concurred in the judgment on a very narrow ground.

The doctrine which was most

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[1]Novel and correctly rejected since it presumes a neutral and detached judicial officer would ignore a proper legal objection when timely made--something no appellate court should assume. Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979).

tenaciously pursued however was the "inadvertence of counsel" or "oversight" doctrine--the theory utilized by the lower tribunal in the case sub judice. This Court should and must repudiate this concept as has almost every Court of Appeals that has addressed the subject.[2]

Of course, those courts are accurate in that the Sykes-Engle doctrine would

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[2] Lumpkins v. Ricketts, 551 F.2d 580 (5th Cir. 1977), cert. denied, 434 U.S. 957; Tyler v. Phelps, 643 F.2d 1095 (5th Cir. 1981); Indiviglio v. United States, 612 F.2d 524 (2d Cir. 1979), cert. denied, 445 U.S. 933; Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899; Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir. 1983), cert. denied, 78 L.Ed.2d 266; Jones v. Jago, 701 F.2d 45 (6th Cir. 1983), cert. denied, 104 S.Ct.274; and Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), en banc, cert. denied, 440 U.S. 974. In each case the courts held such a rule would, "if accepted, effectively eliminate any requirement of showing cause at all." 551 F.2d at 683.

be rendered nugatory if inadvertence of counsel constituted "cause". Chief Justice Burger in Estelle must have appreciated this obvious fact for he noted:

> . . . It is not necessary, if indeed it were possible, for us to decide whether this [the failure to object] was a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion . . .

425 U.S. at 512, n. 9.

The undersigned stated to this Court many years ago that few attorneys would willingly testify before a court that they were attempting to "sandbag" the trial judge in the hope of securing a reversal, if their clients were convicted. Kenneth Roosevelt Williams v. State of Florida, Case No. 5732,

October Term 1970, response at p. 6. Counsel will always say that in the heat of the trial he "overlooked" or failed to "appreciate" the putative error, and will be quite quick to admit his action was not strategic.[3]

Even if the failure to object was inadvertent, the effect upon the finality of the judgment is the same--it is destroyed! It should be recalled that the defendant is only entitled to competent counsel, not perfect or errorless counsel, Engle v. Isaac, supra, and if the State and Federal Governments must insure the acts of counsel, no judgment or sentence will withstand

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[3] Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), n. * at 211.

collateral assault, and the contemporaneous objection rule will become a relic of the past. More importantly, however, adoption of the inadvertence or oversight doctrine would produce "slovenly" defense practice, Levin v. Katzenbach, 363 F.2d 287, 294 (D.C. Cir. 1966) Burger, J. dissenting, at best, and at worst would promote questionable defense conduct, to wit: "sandbagging", which no court should tolerate. Wainwright v. Sykes, supra.

Just this term this Court, on direct appeal in a federal criminal case, reversed two decisions because counsel had not timely objected to the putative error. United States v. Young, 470 U.S. ___, 84 L.Ed.2d 1 (1985) and United States v. Gagnon, 470 U.S. ___,

84 L.Ed.2d 486 (1985). In Young the Court quoting from United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) said:

> . . . counsel for the defendant cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that [the prosecutor's] comments to the jury were improper and prejudicial . . .

85 L.Ed.2d at 13, n. 13.

This footnote is remarkably similar to the Florida Supreme Court's decision in State v. Jones, 204 So.2d 515 (Fla. 1967), wherein the Court established the contemporaneous objection rule, although it was not denominated as such. The Florida Supreme Court said it this way:

Thus, it is seen that to invoke the exception the remark must be of "such character" that it is both "obviously prejudicial" and ineradicable from the minds of the jury.

Previous decisions of this Court indicate broad liberality in applying the exception to the end that there be no infringement in the trial courts of fundamental rights of persons charged with crime. Such an attitude was appropriate in view of the fact that prior to Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, 93 A.L.R.2d 733, it was in the trial of capital cases only that indigent defendants were given the assistance of counsel. This meant that many defendants who were unable to hire an attorney and who were unskilled in court procedure and ignorant of their rights were vulnerable to abuses of overzealous prosecutors. Under such circumstances this Court could do naught but charge the trial judge

with the responsibility of prompt and decisive action by ordering a mistrial in such cases. The exception as thus recognized was intended to have this salutary effect. "As Heaven does its rains, showers, its favors alike on the high and the low, the rich and the poor," the exception had to be applied to those with counsel as well as to those without counsel. This made it possible for defense counsel to stand mute if he chose to do so, knowing all the while that a verdict against his client was thus tainted and could not stand. By such action defendants had nothing to lose and all to gain, for if the verdict be "not guilty" it remained unassailable.

Such procedure is unmindful that an important function of an attorney in a trial is to assist the court. It is the judge's responsibility to supervise the trial. If counsel

performs his duty and promptly calls attention to remarks of the prosecutor which he considers prejudicial the court can excuse the jury, hear from both sides and forthwith take appropriate action if the remark in fact is found to be improper. See Rogers v. State, 158 Fla. 582, 790, 30 So.2d 625.

Prior to the Gideon case the good resulting from the application of the exception over-shadowed the evil, for trial judges, notwithstanding the absence of objection, were admonished to intervene, sua sponte, and declare a mistrial thus assuring to many uninformed defendants on trial without counsel a fair and impartial trial.

At the present time all defendants in criminal trials who are unable to engage counsel are furnished counsel without charge. Application of the exception is no longer necessary to protect those charged with crime who may be ignorant of their rights.

Their rights are now well guarded by defending counsel. Under these circumstances further application of the exception will contribute nothing to the administration of justice, but rather will tend to provoke censure of the judicial process as permitting "the use of loopholes, technicalities and delays in the law which frequently benefit rogues at the expense of decent members of society."

It has been suggested that some courts today seem to be preoccupied primarily in carefully assuring that the criminal has all his rights while at the same time giving little concern to the victim. Upon the shoulders of our courts rests the obligation to recognize and maintain a middle-ground which will secure to the defendant on trial the rights afforded him by law without sacrificing protection

> of society. As Mr. Justice Cardozo explained in Snyder v. Commonwealth of Mass., 291 U.S. 97, 122, 54 S.Ct. 330, 338, 78 L.Ed.2d 674, 687:
>
> > "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
>
> The Court now recants the statement of the exception upon which respondent relies and henceforth will review challenged argument of prosecutors only when an objection is timely made.

204 So.2d 518-519.

Jones like Young involved unobjected to closing argument by the public prosecutor and both decisions were based upon a recognition that preservation of an issue by timely

objection is an essential ingredient of the just and fair administration of law.

Anyone familiar with the everyday practice of law understands that without an objection many things occur that prevent or impede the proper disposition of an issue. First, the record is not properly developed and the appellate court cannot even determine what the facts are which are necessary to decide the issue. Cardinale v. Louisiana, 394 U.S. 437 (1969). Second, the trial judge is deprived of an opportunity to correct any error in the first instance. Wainwright v. Sykes. Lastly, the potential for sandbagging always exists. Wainwright v. Sykes.

These essential requisites to the

administration of justice, of course, are defeated if the defendant can merely file a collateral proceeding and obtain the desired result--particularly when, many years later, memories have faded or witnesses have died, thus rendering retrial impossible. Smith, Federal Habeas Corpus--A Need for Reform, J. Crim.L., C & P.S. (1982).

It should be observed that this Court won't allow federal prisoners to resort to habeas corpus for the purpose of raising issues that could have and should have been raised at trial and, if preserved, on direct appeal. Timmreck v. United States, 441 U.S. 780 (1979). The Florida Supreme Court will not allow Florida's collateral proceedings to be used in such fashion

either.[4]

The doctrine adopted below and that urged before the court by the Respondent, if accepted by this Court would, under Kaufman v. United States, 394 U.S. 217 (1969), be applicable to habeas corpus petitions filed by both state and federal prisoners and the Court would destroy its own contemporaneous objection rule recently reaffirmed in Young and Gagnon, supra. This conclusion compels the result this Court must reach--that is to affirm the viability of the contemporaneous objection rule. To do otherwise would return us to the circumstances

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[4]State v. Matera, 266 So.2d 661 (Fla. 1972); Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980).

which existed under Fay prior to its severe constriction in Sykes. Indeed, if Fay still lives,[5] perhaps it should be overruled. In light of Bullington v. Missouri, 451 U.S. 430 (1981) that "grisly choice" presented in Fay can never occur in the future.

The amicus suggests that "cause" can be defined so as to accommodate the legitimate demands of justice. "Cause" should be: (1) the denial of an opportunity to raise the issue under state law, e.g., the trial judge refuses to entertain an objection or argument on the issue or is shown to be a non-neutral magistrate, Stone v. Powell, 428 U.S. 465 (1976); (2) the right

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[5] United States v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983).

asserted involves a newly created right determined to be retroactive which reasonably competent counsel could not foresee or develop, Engle v. Isaac, supra; (3) the prosecutor withheld material evidence, not available to the defendant or his attorney through the exercise of due diligence, which directly affected the ability of counsel to factually develop or construct the claim, cf. United States v. Bagley, 473 U.S. ___, 87 L.Ed.2d 481 (1985); or, (4) any other impediment not attributable to the defendant or his attorney that prevented the assertion of the belated claim.

This definition provides a narrow but legitimate avoidance of the harsh effects of the contemporaneous objection

rule to insure against a miscarriage of justice while at the same time affording society its legitimate right to administer its criminal justice system free from unwarranted interference by the lower federal courts. Younger v. Harris, supra.

Florida submits that this Court should define "cause" in the narrow fashion suggested above so that the lower federal courts will understand and give effect to the default doctrine. So long as cause remains undefined lower courts will, as they have repeatedly done in the past, look for ways to avoid the "procedural" bar so the "merits" can be disposed of, oft times to the detriment of society.

CONCLUSION

Attorney inadvertence or oversight is nothing more than a post-hoc label created to avoid the Sykes-Engle doctrine in an effort to return convicted defendants to the unworthy position they enjoyed under Fay. While Florida readily understands the desire of defendants to return to that era, it submits that history and experience has demonstrated the administration of justice would suffer irreparable injury and that the public confidence in the criminal justice system would be totally lost, and rightly so.

Respectfully submitted,

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No. 84-1554

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALLYN R. SIELAFF, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS, PETITIONER

v.

CLIFFORD W. CARRIER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether attorney error, based on ignorance or inadvertence that does not constitute ineffective assistance of counsel, nevertheless constitutes "cause" under the "cause and prejudice" standard for excusing a procedural default.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case raises an important question regarding the proper meaning of the "cause" prong of the "cause and prejudice" standard for excusing a convicted defendant seeking collateral relief from the consequences of a procedural default in failing to raise the particular issue at trial or on direct appeal. See *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). While this case involves a state prisoner seeking habeas corpus relief under 28 U.S.C. 2254, the "cause and prejudice" standard also applies in collateral attacks by federal prisoners under 28 U.S.C. 2255. *United States* v. *Frady*, 456 U.S. 152 (1982). The Court's decision in this case therefore will govern collateral attacks on federal convictions.

STATEMENT

1. Respondent Carrier was convicted in Virginia state court of rape and abduction. Before trial, his court-appointed attorney sought to obtain copies of all of the victim's statements to the police that contained descriptions of her assailants, the assailants' vehicle, and the location of the

alleged rape. The prosecution turned the witness's statements over to the trial court for in camera inspection, and the court declined to disclose them to the defense on the ground that they contained "no evidence of an exculpatory nature." Immediately before trial, defense counsel again sought to obtain copies of any statements made to the police by the victim and also requested disclosure of statements by an identification witness. After another in camera inspection, the trial court again declined to release the statements because they contained nothing exculpatory. Pet. App. 4-5. Defense counsel excepted to the trial court's ruling "for purposes of the record," relying on this Court's decision in *Jencks* v. *United States*, 353 U.S. 657 (1957), for the proposition that the defense " 'should have the opportunity to actually review[] those statements.' " See Pet. App. 16-18 & nn.5, 6 (Hall, J., dissenting).

Respondent then appealed his conviction to the Supreme Court of Virginia. In the notice of appeal, defense counsel assigned seven errors, one of which was: "Did the trial judge err by not permitting defendant's counsel to examine the written statements of the victim prior to trial and during the course of the trial?" Pet. App. 5. However, counsel did not pursue this discovery claim in his appellate brief. *Ibid.* The Supreme Court of Virginia thereafter denied respondent's petition for appeal (J.A. 4), and this Court denied certiorari. 439 U.S. 1076 (1979).

2. On February 5, 1980, respondent filed a pro se petition for a writ of habeas corpus in state court, alleging that the withholding of the victim's statements violated the Due Process Clause of the Fourteenth Amendment. The Commonwealth moved to dismiss the petition on the ground that the issue had not been pursued on direct appeal.[1] The circuit court granted that motion, and the Virginia Supreme Court denied review (J.A. 7; Pet. App. 5-6).

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[1] Under Virginia law, errors that could have been but were not raised on appeal generally may not be raised for the first time on collateral attack, unless there is a showing of ineffective assistance of counsel in failing to raise the issue on appeal. See *Slayton* v. *Parrigan*, 215 Va. 27, 29, 205 S.E.2d 680, 682 (1974), cert. denied, 419 U.S. 1108 (1975).

3. In September 1980 respondent filed a pro se petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, alleging that he was denied due process because the victim's statements were withheld from defense counsel. By order dated October 15, 1982, the district court dismissed the habeas petition because of respondent's procedural default in failing to preserve this issue on direct appeal (Pet. App. 27-29). In a footnote, the district court noted respondent's contention that the default was due to ineffective assistance of counsel. The court declined to consider the claim of ineffective assistance, however, because respondent had not exhausted his state remedies with regard to it (*id.* at 28 n.*). The court observed that respondent might be able to establish "cause" for his default—presumably referring to the allegation of ineffective assistance of counsel—but that he should attempt to establish such cause in the first instance in the Virginia courts (*ibid.*).

4. a. In an opinion dated December 27, 1983, a divided panel of the court of appeals reversed and remanded for further proceedings (Pet. App. 3-22). The majority described respondent's claim as one based on *Brady* v. *Maryland*, 373 U.S. 83 (1983), noting respondent's argument that the trial court had erred in denying his request for the victim's statements on the ground that they did not contain "exculpatory" evidence, rather than determining whether they contained evidence that was "material" on the question of guilt. Pet. App. 7 (quoting *Brady*, 373 U.S. at 87).[2] The court acknowledged that respondent had committed a procedural default under Virginia law by not preserving the *Brady* claim on direct appeal (Pet. App. 7-8, 15); it also determined that respondent was not raising an independent claim of ineffective assistance of counsel under the Sixth Amendment based on counsel's failure to preserve the discovery issue on direct

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[2] Of course, the Court made clear in *Brady* that the evidence must be not only "material," but also "favorable to [the] accused" (373 U.S. at 87). See also *United States* v. *Bagley*, No. 84-48 (July 2, 1985), slip op. 6. There is no duty to disclose inculpatory evidence. *Weatherford* v. *Bursey*, 429 U.S. 545, 559-560 (1977).

appeal,[3] observing that "with the exception of the unexplained failure to appeal the *Brady* issue, [respondent's] trial lawyer appears to have performed with diligence and skill." *Id.* at 9. However, the court held that a single act or omission by counsel that is insufficient in itself to contravene the Sixth Amendment nevertheless may satisfy the "cause" prong of the "cause and prejudice" test for excusing a procedural default "if that act or omission resulting in procedural default emanated from ignorance or inadvertence rather than deliberate strategy" (Pet. App. 12).

The court conceded that a "deliberate tactical decision by counsel not to object or appeal a constitutional claim can almost never furnish cause, since matters of trial and appellate tactics are entrusted to the judgment of the lawyer, who acts as the defendant's champion" (Pet. App. 9). In such a case, the defendant could establish "cause" only if the attorney's tactical decision not to object was outside the range of ordinary attorney competence and therefore violated the Sixth Amendment (Pet. App. 12). The court held, however, that a procedural default also may be excused in other cases, even in the absence of a Sixth Amendment violation, "when, through ignorance or oversight, [counsel] fails to exercise [judgment] at all, in dereliction of the duty to represent her client" (Pet. App. 12). In the court's view, the defendant should not be penalized for such a "momentary lapse" by his attorney (*ibid.*).

The court stressed that the question of counsel's "motivation" in failing to preserve the claim was one of fact for the district court to resolve, noting that it lacked testimony from respondent's counsel that might disclose a strategic reason for failing to appeal the *Brady* issue (Pet. App. 14-15). The court accordingly remanded for the receipt of evidence on that question and, if necessary, for a determination whether respondent could demonstrate "prejudice" under the second prong of the "cause and prejudice" test (*ibid.*).[4]

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[3] As this Court made clear in *Evitts* v. *Lucey*, No. 83-1378 (Jan. 21, 1985), slip op. 6, 11, 12-18, a claim of ineffective assistance of appellate counsel actually arises under the Due Process Clause, not the Sixth Amendment.

[4] In remanding, the court rejected the contention that respondent first should be required to exhaust his state remedies with respect to his claim of

b. Judge Hall dissented (Pet. App. 16-22). As an initial matter, Judge Hall disagreed with the majority's view that respondent had actually raised a *Brady* claim at trial, noting that respondent relied only on this Court's decision in *Jencks* when he sought the statements, that he did not object to the trial court's use of an "exculpatory" test when it denied his request, and that he did not mention *Brady* even after trial in his state or federal habeas petitions (Pet. App. 16-18).

Judge Hall next disputed the majority's belief that counsel probably had omitted the *Brady* issue out of inadvertence or ignorance. In Judge Hall's view, the failure to raise a *Brady* issue on appeal "was both tactical and wise, as counsel undoubtedly recognized it as a weak issue" (Pet. App. 19). But more fundamentally, Judge Hall disagreed with the majority's conclusion that mere ignorance or inadvertence on the part of counsel would satisfy the "cause" prong of the "cause and prejudice" test (*id.* at 20):

> I believe that the majority misreads *Wainwright* in concluding such speculative attorney error—error which at worst falls far short of ineffective assistance of counsel—constitutes *Wainwright* cause. Such an extension of the cause standard emasculates the contemporaneous objection rule entirely. Under the majority holding, every time a defense attorney fails to object to an issue (thus, presumptively barring habeas corpus under *Wainwright*), the defendant can assert that his attorney's ignorance of the need for an objection was sufficient cause to avoid the *Wainwright* bar. This interpretation of the cause standard will ultimately allow the exception to swallow the rule.

c. On rehearing en banc, the full court of appeals, by a 5-4 vote, reached the same conclusion as the panel, with both the majority and the dissenters relying on the reasons stated in the respective portions of the panel's opinions (Pet. App. 1-2).

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attorney error on direct appeal. The court explained that respondent relied on that error only to establish "cause" under *Wainwright* v. *Sykes* for his failure to preserve the *Brady* issue on appeal, not to establish an independent claim of ineffective assistance of counsel, and that exhaustion of state remedies is not required on the question of "cause" for a procedural default (Pet. App. 14).

SUMMARY OF ARGUMENT

A. Under *Wainwright* v. *Sykes* 433 U.S. 72 (1977), a prisoner bringing a collateral attack on his conviction may be excused from the consequences of failure to raise the claim at trial or on direct appeal only by showing "cause" for that procedural default and "actual prejudice" resulting from it. The court of appeals' holding in this case that "cause" may be established by showing that the failure to raise the issue was due to ignorance or inadvertence by counsel, rather than a conscious and deliberate tactical choice, is flatly inconsistent with *Engle* v. *Isaac*, 456 U.S. 107 (1982). There, the Court held that the fact that counsel might have "overlooked" a claim or been "unaware[ ]" of the basis for it does not constitute "cause" for the procedural default, so long as counsel rendered constitutionally adequate assistance.

B. The Court's rejection in *Engle* of the rationale adopted by the court of appeals in this case was firmly rooted in the origins, nature, and purposes of the "cause and prejudice" standard.

1. In *Fay* v. *Noia*, 372 U.S. 391 (1963), the Court held that collateral attack would be barred by virtue of a procedural default at trial only if the defendant had "deliberately bypassed" the opportunity to raise his claim in the state proceedings. In *Wainwright* v. *Sykes*, the Court abandoned that test and substituted in its place the narrower "cause and prejudice" test. The court of appeals' holding in this case, under which "cause" would be established unless counsel made a deliberate tactical choice not to raise the claim, would reintroduce the deliberate bypass standard that was explicitly rejected in *Sykes*.

Sykes rests on the principle that a constitutional claim may be forfeited in a criminal case by the failure to make timely assertion of that right at trial or on direct appeal and that such a forfeiture is presumptively enforceable in a collateral attack on the conviction in federal court. The existence of a presumptively enforceable procedural default thus turns not on a subjective intent to waive the constitutional claim, as under *Fay* v. *Noia*, but on the occurrence of an objectively verifiable event: whether the defendant complied with a contemporaneous objection requirement or a similar precondi-

tion to preserving a claim. Similarly, under *Sykes* the existence of "cause" to excuse an otherwise enforceable procedural default also turns not on the subjective intent of the defendant or his attorney, but on the existence of an objectively verifiable and external impediment to the defense's developing or presenting the claim—such as the refusal by the trial or appellate court to entertain the claim or the impracticability of raising it, interference by officials with the assertion of the right, or the unavailability at the time of trial or appeal of the factual or legal basis for the claim.

The deliberate bypass rule of *Fay* v. *Noia* was drawn from the standards for determining whether there has been a valid waiver of a constitutional right by the person whose right is at stake. Because the constitutional rights on which counsel might base an objection at trial or on appeal are not personal to the attorney, the court of appeals' requirement that counsel have made a deliberate choice not to raise the claim has no logical nexus to the standard for waiver of constitutional rights on which *Fay* v. *Noia* rested. Moreover, because a lawyer acts on behalf of the accused in a criminal prosecution and the law therefore does not distinguish between the defendant and counsel insofar as compliance with procedural requirements is concerned, there is no basis under *Sykes* for distinguishing between the defendant and his attorney for purposes of determining whether actual knowledge and a deliberate decision are required in order to excuse a failure to comply with such rules.

2. The court of appeals' holding in this case also finds no support in the competing policy considerations that underlie the "cause and prejudice" standard. From the state's perspective, the interest in insisting upon a contemporaneous objection in order to avoid error and assure finality, and to ensure that any needed retrial is promptly held, is fully applicable irrespective of whether the procedural default at trial or on appeal was due to a deliberate decision by counsel or to his ignorance or inadvertence. There also would be substantial costs associated with determining whether counsel actually had made a deliberate tactical choice, because the habeas court would be required to conduct the sort of potentially chilling post-trial inquiry into counsel's tactics and motivations about which the Court was concerned in *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 19-20, 27.

Nor does the Court's decision in *Reed* v. *Ross*, No. 83-218 (June 27, 1984), support the court of appeals' rule. The Court there held that "cause" is established if the claim involved was novel at the time of trial. However, whether a claim was not "reasonably available" and therefore was novel under *Reed* v. *Ross* turns on an objective factor external to the defense—the state of the law at the time of trial or appeal—not on the subjective state of mind of the attorney at that time. Moreover, where a claim is not novel, there is a substantial risk that the failure to raise it was tactical. In this case, for example, the fact that counsel initially raised the discovery issue in his statement of issues on appeal suggests that he considered pursuing the point but deliberately deleted it in order to concentrate on more promising issues.

From the standpoint of the defendant, the fundamental fairness of his trial would seem to be little affected by whether a particular claim was lost through counsel's failure to realize its availability and potential merit or through counsel's deliberate (but perhaps unwise) decision not to press the claim. In either event the defendant stands equally convicted, and any possibility that the outcome would have been different had his lawyer acted differently is entirely unaffected by his lawyer's motive (or lack of motive) for failing to assert the claim, as long as the lawyer satisfied the constitutional standards for effective assistance of counsel. As this Court made clear in *Strickland* v. *Washington*, where counsel's performance satisfied these standards, the trial must be regarded as having been fundamentally fair insofar as the role of counsel is concerned.

ARGUMENT

INADVERTENCE OR IGNORANCE SHORT OF INEFFECTIVE ASSISTANCE OF COUNSEL DOES NOT CONSTITUTE "CAUSE" FOR EXCUSING A PROCEDURAL DEFAULT

Under *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), and its progeny, a procedural default that bars litigation of a constitutional claim in state court also forecloses federal habeas corpus relief absent a showing of "cause" for that default and "actual prejudice" resulting from it. The court of appeals held

in this case that a prisoner can satisfy the "cause" requirement by showing that the failure to raise the claim at trial or on appeal was the result of inadvertence or ignorance by his attorney, rather than being a conscious and deliberate tactical decision. This is so, the court held, even though counsel's "momentary lapse" did not cause his performance to fall outside the range of ordinary attorney competence and therefore would not support an independent claim of ineffective assistance of counsel under the Sixth Amendment at trial [5] or under the Due Process Clause on appeal.[6]

As a practical matter, the test announced by the court of appeals amounts to a virtual elimination of the "cause" requirement and a return to the "deliberate bypass" standard adopted in *Fay* v. *Noia*, 372 U.S. 391 (1963). It excuses nondeliberate defaults, not only in the case of those critical decisions that must be made by the client personally, but in connection with any question of trial or appellate strategy or procedure that may result in a default.

Apart from the devastating effect adoption of this standard would have on the effectiveness of procedural default rules in serving their intended purpose, it would also pose serious problems of administration for the habeas court. To begin with, in order to resolve the "cause" issue under the Fourth Circuit's approach, the court on collateral attack would be forced in most if not all cases to conduct a hearing and make difficult determinations regarding counsel's trial and appellate strategy and motives in an attempt to ascertain whether the default that occurred actually was the result of ignorance or inadvertence rather than deliberate choice. Beyond that, however, the "ignorance or inadvertence" standard would not be easy to apply, since there are numerous intermediate positions between complete unawareness of a claim and a deliberate decision not to assert it despite an accurate assessment of its merit. For example, if a lawyer considered making a claim and decided not to do so,

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[5] *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 17-21.

[6] *Evitts* v. *Lucey*, No. 83-1378 (Jan. 21, 1985), slip op. 6, 11, 12-18.

based upon an erroneous judgment that the claim lacked legal merit,[7] does the error amount to "ignorance" excusing the default? If so, there would be few cases indeed in which "cause" could not be shown.

A. This Court's Decision In *Engle* v. *Isaac* Establishes That Inadvertence Or Ignorance On The Part Of Counsel Does Not Satisfy The "Cause" Requirement

The court of appeals' holding in this case, which largely vitiates the "cause" requirement, is directly inconsistent with this Court's decision in *Engle* v. *Isaac*, 456 U.S. 107 (1982). In *Engle*, the Court considered whether "cause" had been established for the habeas petitioners' procedural default in failing to object to a jury instruction that required them to bear the burden of proof on the issue of self-defense. See 456 U.S. at 110-115. The Court stated that in such a case "[t]he defendant's counsel, for whatever reasons, has detracted from the trial's significance by neglecting to raise a claim in that forum," and the Court acknowledged that "[c]ounsel's default may stem from simple ignorance or the pressures of trial," as well as a "deliberate[]" choice by counsel. *Id.* at 128-129 & n.34. These passages make clear that the Court was addressing defaults that stemmed from ignorance or inadvertence as well as those due to deliberate tactical decisions.

The Court then reviewed the state of the law at the time the habeas petitioners in *Engle* were tried (456 U.S. at 130-133), finding that they did not then "lack[] the tools to construct their constitutional claim" on the burden of proof issue (*id.* at 133). Against this background, the Court concluded (*id.* at 133-134 (emphasis added)):

> We do not suggest that every astute counsel would have relied upon [*In re Winship*, 397 U.S. 358 (1970)] to assert the unconstitutionality of a rule saddling criminal defendants with the burden of proving an affirmative defense. Every trial presents a myriad of possible claims.

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[7] Since a non-meritorious claim would not survive the "prejudice" prong of the "cause and prejudice" test, the "cause" prong is critical to enforcing a default only in the case of claims that would have been upheld had they been properly preserved.

> Counsel might have *overlooked* or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that *the Constitution guarantees criminal defendants only a fair trial and a competent attorney.* It does not insure that defense counsel will *recognize* and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged *unawareness* of the objection as cause for a procedural default.

In this passage, the Court clearly rejected the contention that counsel's inadvertence (an "overlooked" claim) or his ignorance ("unawareness") of the legal basis for the claim would constitute "cause" excusing the procedural default, at least where the defendant was provided the "competent attorney" that the "Constitution guarantees"—*i.e.*, at least where counsel's omission did not amount to ineffective assistance of counsel under the Sixth Amendment.[8]

The court of appeals' holding in this case simply cannot be squared with the explicit holding of *Engle*. And, indeed, the court of appeals made no effort to do so; it did not even cite or otherwise acknowledge these dispositive portions of the Court's opinion.[9] By contrast, the other courts of appeals that have addressed the question since *Engle* uniformly have held that inadvertence, ignorance or like error by counsel short of constitutionally ineffective assistance does not constitute the "cause" necessary to excuse a procedural default.[10]

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[8] In *Engle*, respondent Isaac argued (Br. 3-4, 8-10, 12) that trial counsel had never considered or perceived the claim; respondent Hughes argued (Br. 14) that there had been no "deliberate" or "strategic" decision by counsel to build reversible error into the case; and respondent Bell argued (Br. 49-52) that inadvertence, ignorance or neglect by counsel, as distinguished from a tactical or strategic decision, should constitute cause.

[9] The court of appeals' only citation to *Engle* was in connection with its discussion of the distinct question of exhaustion of state remedies. See Pet. App. 14 n.8.

[10] See *Cantone* v. *Superintendent, New York Correctional Facility*, 759 F.2d 207, 218 (2d Cir. 1985); *Tsirizotakis* v. *LeFevre*, 736 F.2d 57, 62 (2d Cir. 1984), cert. denied, No. 84-5305 (Oct. 1, 1984); *United States ex rel.*

In reaching its decision here the Fourth Circuit, with virtually no independent analysis of the "cause" requirement, relied exclusively on decisions of other courts of appeals that were rendered *prior* to *Engle* and that no longer are good law even within their own circuits, as shown by subsequent decisions of those courts rendered after *Engle*.[11] The court of appeals' decision here was thus an anachronism when it was rendered and adopted by the en banc court.

B. The Rule Announced By The Court Of Appeals Is Inconsistent With The Origins, Nature, And Purposes Of The "Cause And Prejudice" Standard

The court of appeals' holding that a procedural default may be validly enforced only when the failure to raise or preserve a claim is the product of the lawyer's deliberate tactical

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Caruso v. *Zelinsky*, 689 F.2d 435, 443-444 (3d Cir. 1982); *Wiggins* v. *Procunier*, 753 F.2d 1318, 1321-1322 (5th Cir. 1985); *Weaver* v. *McKaskle*, 733 F.2d 1103, 1106 (5th Cir. 1984); *Long* v. *McKeen*, 722 F.2d 286, 288-289 (6th Cir. 1983), cert. denied, 465 U.S. 1106 (1984); *Webster* v. *Engle*, 721 F.2d 566, 568 (6th Cir. 1983); *Hockenbury* v. *Sowders*, 718 F.2d 155, 160 (6th Cir 1983), cert. denied, No. 83-6218 (May 14, 1984); *Williams* v. *Nix*, 751 F.2d 956, 960 (8th Cir. 1985); *Thomas* v. *Auger*, 738 F.2d 936, 939 (8th Cir. 1984); *Dietz* v. *Solem*, 677 F.2d 672, 673, 675 (8th Cir. 1982); *Matias* v. *Oshiro*, 683 F.2d 318, 321 n.3 (9th Cir. 1982); *Baumann* v. *United States*, 692 F.2d 565, 572 (9th Cir. 1982); *Palmes* v. *Wainwright*, 725 F.2d 1511, 1525 (11th Cir. 1984); *Spencer* v. *Zant*, 715 F.d 1562, 1575 (11th Cir. 1983); *Birt* v. *Montgomery*, 709 F.2d 690, 699 (1983), on rehearing, 725 F.2d 587, 597 (11th Cir. 1984) (en banc), cert. denied, No. 83-6830 (Oct. 1, 1984). Similarly, in *Runnels* v. *Hess*, 713 F.2d 596 (1983), the Tenth Circuit superseded its pre-*Engle* decision in the same case (653 F.2d 1359 (1981)) upon which the Fourth Circuit had relied in the instant case (Pet. 11, 15). See also *Clay* v. *Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 430-431, 433 n.4 (7th Cir. 1984) (reserving the question whether attorney error short of ineffective assistance can constitute "cause," and finding "cause" because counsel rendered ineffective assistance under Sixth Amendment standards).

[11] The court of appeals in this case relied upon pre-*Engle* decisions of the Fifth, Sixth, Eighth, Ninth and Tenth Circuits. See Pet. App. 10-12, 15. However, as indicated by the citations in note 10, *supra*, each of these courts subsequently discarded its pre-*Engle* view; the Fourth Circuit failed to take note of those developments in either its panel or en banc opinion. Indeed, even the Fourth Circuit previously had appeared to recognize that *Engle* rejected the very rationale adopted in this case. See *Honeycutt* v. *Mahoney*, 698 F.2d 213 (1983); *Wilson* v. *Procunier*, 747 F.2d 251, 252 (1984), cert. denied, No. 84-5852 (Feb. 19, 1985).

choice—and correspondingly that a habeas petitioner can establish "cause" for a procedural default by showing that it was attributable to ignorance or inadvertence by counsel—also is inconsistent with the origins, nature, and purposes of the "cause and prejudice" standard.

1. a. In *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), the Court held that the "cause and prejudice" standard, which previously had been applied in *Davis* v. *United States*, 411 U.S. 233 (1973), and *Francis* v. *Henderson*, 425 U.S. 536 (1976), in the context of the failure to object to the composition of the grand jury prior to trial, should also be applied to other forms of defaults. The *Sykes* Court first described the standard that had been announced in *Fay* v. *Noia*, 372 U.S. 391 (1963), under which a federal district court was to deny relief only if the applicant had " 'deliberately by-passed the orderly procedure of the state courts' " (433 U.S. at 83 (quoting 372 U.S. at 438)). This standard in *Fay* for determining when a defendant was to be bound to a procedural default was drawn from the standard the Court had applied in other contexts for determining whether there had been a binding waiver of a constitutional right such as the right to counsel or to a jury trial—*i.e.*, whether there had been " 'an intentional relinquishment or abandonment of a known right or privilege' " (372 U.S. at 439, quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). In the Court's words in *Sykes*, a waiver under *Fay* had to be "knowing and actual" (433 U.S. at 83).

In adopting the "cause and prejudice" standard in *Sykes*, the Court left for resolution in future decisions the precise definition of that standard, except to note that "it is narrower than the standard set forth in dicta in *Fay* v. *Noia*, 372 U.S. 391 (1963), which would have federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention." 433 U.S. at 87. It therefore is clear that the Court intended in *Sykes* that the defendant could be held to his procedural default in the original proceedings, and thereby precluded from raising his constitutional claim on collateral attack, even if he was unaware of the claim at the time the forfeiture occurred.

It would be wholly inconsistent with *Sykes* to hold that the habeas petitioner nevertheless may establish "cause" by showing that his default was not due to a knowing and deliberate tactical decision but instead was due to inadvertence or ignorance; to do so would reintroduce the deliberate bypass rule of *Fay* v. *Noia*. Yet that is what the court of appeals has done in this case. The only difference is that the court of appeals' decision focuses on whether the lawyer, rather than the defendant personally, made a deliberate tactical choice. That is not what this Court had in mind in *Sykes*. See Pet. App. 20 (Hall, J., dissenting); *Palmes* v. *Wainwright*, 725 F.2d 1511, 1525 (11th Cir. 1984).

The background and circumstances of *Sykes* certainly do not suggest that the Court intended to preserve the deliberate bypass rule in this manner. See 433 U.S. at 94 (Burger, C.J., concurring). Justice Brennan's dissent in *Sykes* pointed out that there was no basis for inferring that either Sykes *or* his lawyer was even aware of the existence of the Fifth Amendment claim (433 U.S. at 104); by repeatedly focusing on the question (*id.* at 100, 101 n.3, 104, 105, 107, 110, 111, 112, 113, 114 & n.13, 115, 117), the dissent recognized that the logic of the majority's holding would result in the preclusion of federal habeas relief where the procedural default resulted from counsel's inadvertence or negligence. A further confirmation of the intent of *Sykes* in this regard derives from the Court's tracing of the origins of its rule to *Davis* v. *United States* (see 433 U.S. at 84-85), because the Court's opinion in *Davis* indicates (411 U.S. at 243-244) that neither the defendant nor his attorney was actually aware of all the relevant facts bearing on a possible objection to the composition of the grand jury, even though these facts could have been ascertained at the time that Fed. R. Crim. P. 12 required an objection to be lodged. See also *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 361-364 (1963).[12]

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[12] Similarly, in *Tollett* v. *Henderson*, 411 U.S. 258 (1973), decided the same day as *Davis*, the Court held that the habeas petitioner had forfeited his right to object to infirmities in the selection of the grand jury even though the relevant facts were found "to have been unknown to both respondent and his attorney" at the time of trial (411 U.S. at 266). See also

b. In any event, the Fourth Circuit's holding in this case is inconsistent with the premises and reasoning of *Sykes*. That decision rests on the principle "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). A forfeiture therefore need not amount to a "knowing and actual" waiver of the opportunity to raise the constitutional claim in state court in order to be enforced by a federal court on collateral attack, as was required under *Fay* v. *Noia*. See 433 U.S. at 83. Under *Sykes*, the procedural default is presumptively enforceable on collateral attack even if it was only a constructive "waiver" that resulted by operation of law from the failure to comply with a procedural provision requiring a claim to be presented at a particular time. The question of an enforceable default thus turns not on subjective intent, but on the occurrence of an objectively verifiable factor: whether the defendant complied with a contemporaneous objection requirement or a similar procedural precondition to preservation of a claim. Both logically and of practical necessity, this rule of forfeiture applies whether or not either the defendant *or* his lawyer actually recognized and considered raising the claim.

Under *Sykes*, relief from an otherwise enforceable forfeiture may be granted in a subsequent collateral attack proceeding only upon a showing of some impediment to complying with the procedural requirement at trial or on direct appeal that constitutes a legitimate and sufficient "cause" for the default. But the absence of actual knowledge and a deliberate decision by either the defendant or his attorney cannot be such "cause"; if it were, the distinction between loss of a claim through a default and the relinquishment or abandonment of a right by a conscious and affirmative waiver would be obliterated. Instead, like the existence of the default itself, the existence of "cause" to excuse the default ordinarily should be determined by reference to objectively verifiable factors that are external to the defense.

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id. at 273-276 (Marshall, J., dissenting); *Estelle* v. *Williams*, 425 U.S. 501, 526 (1976) (Brennan, J., dissenting); *Francis* v. *Henderson*, 425 U.S. at 549 n.2, 550 (Brennan, J., dissenting).

Thus, for example, "cause" for a procedural default would be established by showing that the court refused to entertain an objection or an offer of proof, or that it was not practicable for the defendant to make one (compare *Reece* v. *Georgia*, 350 U.S. 85 (1955), with *Michel* v. *Louisiana*, 350 U.S. 91 (1955); cf. *Rose* v. *Mitchell*, 443 U.S. 545, 561, 563 (1979); *Stone* v. *Powell*, 428 U.S. 465, 489, 494 (1976)), that the default resulted from "incapacity, or some interference by officials" (*Brown* v. *Allen*, 344 U.S. 443, 486 (1953)), that the legal or factual basis for the claim was not "reasonably available" with the exercise of due diligence at the time it was required to have been presented (*Reed* v. *Ross*, No. 83-218 (June 27, 1984), slip op. 15; compare *Davis* v. *United States*, 411 U.S. 233, 243-244 (1973), and *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 363 (1963)), or perhaps that there was a unique feature of the procedural system or the posture of the case that would have made the cost of avoiding the procedural default unacceptably high under the circumstances (*Clay* v. *Director, Juvenile Division, Department of Correction*, 749 F.2d 427, 434-435 (7th Cir. 1984) (Posner, J., concurring); cf. *Sykes*, 433 U.S. at 83 (quoting *Fay* v. *Noia*, 372 U.S. at 440) (noting the defendant's "grisly choice" between accepting a life sentence and pursuing an appeal that might have resulted in a death sentence); see also *Riner* v. *Owens*, 764 F.2d 1253, 1257 (7th Cir. 1985).

There perhaps are some other, exceptional circumstances in which "cause" would be found for a procedural default, consistent with the Court's assurance that the "cause and prejudice" standard will be applied in such a way as to prevent a "miscarriage of justice" (*Sykes*, 433 U.S. at 91). But in providing this assurance the Court surely did not mean to embrace a rule such as adopted by the Fourth Circuit here, which would almost wholly vitiate the enforceability of procedural defaults. Rather, the focus of the inquiry under the principles announced in *Sykes* should remain whether there was a defect in the trial or appellate process that brought about the default or some other external impediment to developing or presenting the claim.

c. It would, moreover, be particularly inappropriate to reintroduce the "knowing and deliberate bypass" standard in the context of counsel's actions. As explained above, the deliberate bypass rule of *Fay* v. *Noia* was drawn directly from the standard for finding a valid waiver of those constitutional rights that may be lost only by an affirmative waiver. Such rights are personal to the accused and therefore cannot generally be waived without the personal participation of the accused. See 372 U.S. at 439. However, the constitutional rights on which counsel might base an objection at trial or on appeal are not personal to the attorney. A rule under which "cause" would be found for a procedural default whenever counsel did not make a deliberate choice to forgo proper assertion of the claim therefore has no logical nexus to the standards for waiver of constitutional rights on which even the deliberate bypass rule of *Fay* v. *Noia* was based. See *Sykes*, 433 U.S. at 93-94 (Burger, C.J., concurring). Accordingly if, as the Court held in *Sykes*, a knowing and deliberate decision by the *accused* no longer is required in order for him to be bound by a procedural default (in the absence of some other sufficient "cause" for that default), it would be perverse to require that the default nevertheless must have been the product of a knowing and deliberate decision by *counsel*, as the court of appeals held.

The Fourth Circuit's rule also distorts the relationship between the accused and his attorney. The Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta* v. *California*, 422 U.S. 806, 820 (1975). To be sure, when the defendant chooses to have his lawyer present his case, law and tradition allocate to the lawyer the power to make binding decisions on all but such fundamental matters as whether to plead guilty, waive a jury, testify, or take an appeal. See *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The lawyer makes those decisions, however, not in his own right, but as the representative of the accused. The defense the lawyer presents therefore is, in contemplation of law, that of the accused personally (*Faretta*, 422 U.S. at 820-821), who is bound by counsel's conduct at trial or on appeal "except where 'the circumstances are

exceptional' " (*Sykes*, 433 U.S. at 91 n.14 (quoting *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965)); see also 433 U.S. at 93-94 (Burger, C.J., concurring); *id.* at 94-95 (Stevens, J., concurring); *Estelle* v. *Williams*, 425 U.S. 501, 515 n.4 (1976) (Powell, J., concurring)). Because defense counsel acts on behalf of his client, and because our criminal justice system does not distinguish between the defendant and his attorney insofar as compliance with procedural rules is concerned, there is no legal or logical basis under *Sykes* for a rule that distinguishes between the defendant and his attorney with respect to whether actual knowledge and a deliberate decision is required in order to enforce the consequences of a failure to comply with such rules.

2. For the reasons just discussed, the Court's holding in *Engle* that counsel's unawareness of a legal claim that was available at the time of trial or direct appeal does not constitute "cause" for a procedural default was firmly rooted in the reasoning and purposes of *Sykes* itself. As we now demonstrate, the soundness of that conclusion is reinforced by reference to the policy considerations that animated the Court's substitution of the "cause and prejudice" standard for the "deliberate bypass" test of *Fay* v. *Noia*.

a. *Sykes* identified four substantial reasons for according contemporaneous objection rules at trial a "greater respect" (433 U.S. at 88) than they received under the deliberate bypass standard. First, timely objection may either avert error or at least permit prompt corrective measures and the prevention of further error, "thereby making a major contribution to finality in criminal litigation" (*ibid.*). Second, when an individual is brought to court to stand trial, "[s]ociety's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens" (*id.* at 90); "[a]ny procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification" (*ibid.*). Third, "the rule of *Fay* v. *Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a

verdict of not guilty * * * with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off" (*id.* at 89); that collateral attack might occur at a time when successful reprosecution would be more difficult or even impossible. Fourth, if factual findings are necessary, "[a] contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding" (*id.* at 88). See also *Engle*, 456 U.S. at 126-131.

In *Reed* v. *Ross*, the Court recognized that similar considerations of finality, efficiency, and the facilitation of prompt retrials apply with respect to procedural rules, such as the Virginia rule in this case, that provide for the forfeiture of claims not raised on direct appeal. The Court accordingly held that the "cause and prejudice' standard applies to appellate defaults as well as trial defaults. Slip op. 9-10. See also *Leroy* v. *Marshall*, 757 F.2d 94, 95 n.1 (6th Cir. 1985) (collecting cases).

With the exception of the "sandbagging" factor, the concerns identified in *Sykes* are fully applicable irrespective of whether the procedural default was due to a deliberate decision by counsel or to his ignorance or inadvertence. In either event, "[t]he defendant's counsel, for whatever reasons, has detracted from the trial's [or appeal's] significance by neglecting to raise a claim in that forum." *Engle*, 456 U.S. at 128-129. Moreover, although sandbagging in itself constitutes a particular affront to orderly procedures because of its deliberate nature, the concrete consequences of sandbagging (piecemeal review and the prospect of a retrial at a much later date) can result just as readily where the procedural default was due to counsel's unawareness. Compare *United States* v. *Agurs*, 427 U.S. 97, 110 (1976).

In addition, there would be substantial costs associated with attempting to identify those circumstances in which there actually had been sandbagging or some other deliberate decision by counsel not to raise the claim at the time required. The court of appeals contemplated (Pet. App. 14-15) that resolution of that issue would require an inquiry into

counsel's "motivation." This in turn presumably would require an evidentiary hearing, often long after trial, including testimony by counsel (if he is still available and has a recollection of the proceedings) regarding his state of mind and tactical judgments.

This Court has recognized the potential adverse consequences for the independence of counsel and the functioning of the criminal justice system that may result from such intrusive post-trial inquiry into counsel's performance. See *Strickland* v. *Washington*, slip op. 19-20, 27. No doubt such an inquiry is sometimes inevitable under *Strickland* when a defendant directly challenges his attorney's actions by bringing an independent, constitutionally based claim of ineffective assistance of counsel. But the Court should hesitate before it adopts a formulation of the "cause" standard that would require an inquiry into counsel's motivation where the attorney's performance is not the ultimate focus of the challenge. These considerations weigh heavily against any rule that makes the existence of "cause" depend on the subjective knowledge and intent of counsel.

The Court did observe in *Reed* v. *Ross* that "the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests" (slip op. 12-13). The "certain circumstances" with which *Reed* v. *Ross* itself was concerned involved a constitutional claim that was novel at the time of trial but established as meritorious by the time of the collateral attack proceeding, and the Court held that "cause" exists in such a case if counsel had no "reasonable basis" upon which to formulate the constitutional claim and it therefore was not "reasonably available" to him. *Id.* at 13-15. Resolution of that question turns not on the state of mind of the attorney, but on the state of the law at the time of trial, which is an objective external factor. See *id.* at 15-18. Compare *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-819 (1982). The Court in *Reed* v. *Ross* did not question the holding in *Engle* that counsel's actual unawareness of a legal claim that *was* reasonably available at the time of trial does not constitute "cause."

Nor does the Court's reasoning in *Reed* v. *Ross* support the court of appeals' holding in this case. First, the Court observed that in the case of a novel claim "it is safe to assume that [counsel] is sufficiently unaware of the question's latent existence that we cannot attribute to him strategic motives of any kind." Slip op. 13. A court obviously cannot have the same confidence where a habeas petitioner asserts that his attorney simply overlooked or was unaware of the legal basis for a claim that was reasonably available at the time of trial and had been identified and raised by other lawyers. See *Engle*, 456 U.S. at 133-134. Indeed, as Judge Hall observed in his dissent (Pet. App. 16-18), there is every reason to believe that counsel's actions in this case were deliberate. The fact that counsel requested disclosure of the statements at trial and initially identified the discovery issue in the notice of appeal strongly suggests that there subsequently was a conscious choice to abandon that issue in order to concentrate on what might have seemed to be more promising claims. See *Jones* v. *Barnes*, 463 U.S. at 751-754. It is hard to fault this judgment. Although respondent and the court of appeals now characterize the issue as a *Brady* claim, counsel's request at trial appears to have been a nonconstitutionally based discovery request relying on the rationale of *Jencks* (see Pet. App. 17 (Hall, J., dissenting)), and his statement of the issue in the notice of appeal was not framed in constitutional terms (*id.* at 5). Counsel might have concluded that the prospects of success on the discovery issue were not promising under state law. This is doubly so viewing the matter in *Brady* terms; counsel could well have concluded that the witness statements were unlikely to include any evidence that was material and favorable to respondent, especially since the trial court had reviewed the statements in camera prior to trial and concluded that they contained nothing exculpatory.

Second, the Court in *Reed* v. *Ross* explained that a rule requiring counsel to raise a novel question would serve little functional purpose, because the novelty of the claim would probably lead the court to reject it. Slip op. 13-14. By contrast, where a claim is not novel, there is every reason to believe that the court may be receptive if the claim is in fact

meritorious. A rule that does not excuse a procedural default based on mere inadvertence or ignorance reinforces counsel's duty and incentives to be vigilant at the trial itself and on direct appeal in bringing any such issues to the court's attention.[13]

b. The countervailing considerations that also "have come to be embodied in the 'cause and prejudice' requirement" (*Reed* v. *Ross*, slip op. 9) likewise do not support the court of appeals' holding. Those considerations are (1) the prisoner's interest in having a federal forum for the presentation of his claim (*id.* at 8) and (2) the role of the writ of habeas corpus as "a bulwark against convictions that violate 'fundamental fairness' "(*Engle*, 456 U.S. at 126, quoting *Sykes*, 433 U.S. at 97 (Stevens, J., concurring)).

Acknowledgment of a state defendant's abstract interest in presenting his claim to a federal forum if it fails in state court offers little guidance in giving content to the "cause" standard. That interest is certainly exceedingly limited, if not nonexistent, when the defendant was not sufficiently interested in his federal constitutional claim even to raise or preserve it during the state proceedings. In any event, it seems most unlikely that the prisoner's interest in presenting a defaulted claim to a federal forum is much affected by whether his lawyer's failure to raise and preserve the claim in state court was due to a deliberate tactical decision or to ignorance or inadvertence.

That distinction also has no bearing on the fundamental fairness of the conviction—at least where, as the court of appeals necessarily assumed in this case (Pet. App. 9), the attorney's performance satisfied constitutional standards of effective assistance of counsel. This conclusion is demonstrated by positing a situation involving two defendants convicted at a joint trial in which an error occurred that equally affected both. Suppose the attorney for one defendant recognized the

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[13] The Court also was concerned in *Reed* v. *Ross* that a holding that required counsel to raise even claims having a novel legal basis would lead to too many objections by counsel at trial or to the cluttering of appellate briefs with far-fetched claims, in order to avoid procedural defaults. Slip op. 14. This concern likewise has no application where there is a reasonable basis for the argument in existing law.

error and considered raising an objection but declined to do so for tactical reasons, while the attorney for the other either failed to notice the error or was unaware of the legal basis for an objection. If actual prejudice could be shown to have resulted from the error, then under the Fourth Circuit's holding, the second defendant would be entitled to federal habeas relief but the first would not. Yet it cannot seriously be contended that the fundamental fairness of the two convictions is significantly different—or that one defendant, but not the other, is suffering from a "fundamentally unjust incarceration" (*Engle,* 456 U.S. at 135) entitling him to access to a federal forum—simply because their attorneys had different subjective states of mind when the error occurred at trial. This Court has stressed that the definition of the terms "cause" and "prejudice" must be informed by the role of the writ of habeas corpus in preventing miscarriages of justice. *Engle,* 456 U.S. at 135; *Sykes,* 433 U.S. at 91. Because counsel's state of mind has no direct relation to whether a miscarriage of justice has occurred, the existence of "cause" should not turn on that factor.

This does not mean, of course, that the accused in a criminal prosecution has no protection against errors by his attorney. In *Strickland* v. *Washington,* this Court for the first time announced standards to govern the determination whether counsel has rendered the effective assistance required by the Sixth Amendment. Compare *Sykes,* 433 U.S. at 117-118 (Brennan, J., dissenting). If the defendant can show that counsel's performance, including his failure to raise or preserve an objection, was not within the range of reasonable competence demanded of attorneys in criminal cases (*Strickland,* slip op. 17-21) and that there is a reasonable probability that any errors by counsel affected the outcome of the trial (*id.* at 24), he is entitled to habeas relief on an independent claim of ineffective assistance of counsel. But if counsel's performance was constitutionally effective under these standards, the trial must be regarded as having been fundamentally fair insofar as the role of counsel is concerned. *Id.* at 14-17, 19, 23-24, 26, 30; *United States* v. *Cronic,* No. 82-660 (May 14, 1984), slip op. 4-9. In that event, the habeas

court should look elsewhere than to counsel's performance in ascertaining whether the conviction was fundamentally fair. Moreover, any attempt to identify the types of errors by counsel that do not rise to the level of constitutionally ineffective assistance but nevertheless do amount to "cause" for a procedural default would lead to the very confusion concerning the appropriate standards for evaluating attorney performance that this Court's decision in *Strickland* had served to eliminate.

For the foregoing reasons, the Court should adhere to its view in *Engle* that counsel's overlooking of a claim or his unawareness of the legal basis for the claim does not constitute "cause" for a procedural default, at least if the defendant received the effective assistance of counsel that the Constitution guarantees.[14]

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[14] Because the court of appeals in this case assumed that respondent's attorney did not render ineffective assistance of counsel, there is no occasion for the Court to decide in this case whether counsel's failure to raise or preserve an objection constitutes "cause" where his omission was sufficiently egregious to amount to ineffective assistance of counsel under Sixth Amendment standards. Some courts of appeals have held or suggested that "cause" would be established in such circumstances. See, *e.g.*, *Clay* v. *Director, Juvenile Division, Department of Corrections*, 749 F.2d at 430-431; *Tsirizotakis* v. *LeFevre*, 736 F.2d at 62; *Birt* v. *Montgomery*, 709 F.2d at 699; *Baumann* v. *United States*, 692 F.2d at 572; *United States ex rel. Caruso* v. *Zelinsky*, 689 F.2d at 443-444. The Fifth Circuit has held to the contrary. *Wiggins* v. *Procunier*, 753 F.2d at 1321-1322; *Weaver* v. *McKaskle*, 733 F.2d at 1106. The outcome should be the same under either approach, because the standard for evaluating the attorney's performance would be the same for purposes of showing "cause" as it would be for purposes of establishing a Sixth Amendment claim of ineffective assistance of counsel, and because the habeas petitioner must establish actual prejudice whether he is attempting to overcome a procedural default caused by counsel or seeking relief on an independent claim of ineffective assistance of counsel.

CONCLUSION

The judgment of the court of appeals should be reversed.
Respectfully submitted.

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NO. 84-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLYN R. SIELAFF, Director
Virginia Department of Corrections,

Petitioner,

V.

CLIFFORD W. CARRIER,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE, THE LEGAL FOUNDATION OF AMERICA, JOINED BY NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., URGING REVERSAL

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INTEREST OF AMICI CURIAE

The National District Attorneys Association, Inc. ("NDAA") is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and amicus curiae activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. Among other

goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. LFA is located on the campus of, and shares certain personnel and activities with, the South Texas College of Law in Houston. In support of its goals, the Foundation's attorneys have frequently appeared to represent it as amicus curiae in this Court, as well as in the lower courts.

Americans for Effective Law Enforcement, Inc. ("AELE") is a national not-for-profit citizens' organization interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their lives, liberties and property, within the framework of the various state and federal constitutions. AELE has previously appeared as amicus curiae more than 60 times in this Court.

The International Association of Chiefs of Police, Inc. ("IACP"), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publication, legislative reform, and amicus curiae advocacy, IACP seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

SUMMARY OF ARGUMENT

Amici curiae anticipate that the Commonwealth of Virginia, which is represented by capable and diligent counsel, will thoroughly brief arguments centering upon the case law. Amici curiae wish to avoid unnecessary duplication of Virginia's arguments, although we agree with those arguments and wish to express support for them. Therefore, this brief instead concentrates upon issues of public policy. Further, although amici agree with Virginia's arguments regarding Respondent Carrier's failure to exhaust state remedies, this brief is confined to the other issue, concerning "cause" for setting aside state procedural rules.

The court of appeals' approach not only conflicts with the prior decisions of this Court, but would interfere with the effective discharge of the duties of the federal courts, to the disadvantage of diligent attorneys, of the citizenry, and of habeas corpus petitioners. Specifically, the court of appeals' approach would force diligent counsel to forego his own judgments concerning the withholding of objections upon marginal issues, solely to prevent the possibility that later judgments by others may result in the labeling of his conduct in ambiguous matters as a "lapse" or an "error." The result would be to emphasize the presentation of lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. As a collateral consequence, the lower court's reasoning would obliterate the distinction between competent and incompetent counsel, unfairly stigmatizing diligent attorneys.

At the same time, the court of appeals' approach would make federal habeas decisions depend upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. It would encourage abuse of the writ, contributing to the burden of less meritorious cases that makes difficult the federal courts' task of identifying truly meritorious habeas claims.

ARGUMENT

A SINGLE INSTANCE IN WHICH A FULLY EFFECTIVE AND COMPETENT ATTORNEY WITHHOLDS AN OBJECTION OR ARGUMENT SHOULD NOT FURNISH "CAUSE" TO SET ASIDE STATE PROCEDURAL RULES ON GROUNDS NOT AMOUNTING TO INEFFECTIVENESS OF COUNSEL.

The court of appeals, below, characterized the defense attorney's withholding of an issue he had fully preserved for appeal in the state system as probably involving a "momentary lapse by counsel." [1] Amici respectfully submit, instead, that the

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1 Carrier v. Hutto, 724 F.2d 396, 402 (1983). Although the court remanded for an evidentiary hearing, it persisted in the asserted

attorney's decision[2] not to detract from his brief with the extremely marginal[3] claim at issue was not a lapse (not even a momentary one), but rather was effective appellate briefing

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belief that "the likelihood of attorney error appears very great." Id. at 402. (Amici respectfully disagree for reasons set forth infra in notes 3-4.)

2 Counsel actually specified the issue in the state appellate court in his allegations of error. If he had failed to object or specify the issue, inadvertence might be a possibility. A mistake is exceedingly unlikely, however, when counsel has not only objected, but has actually specified the error to the appellate court. Thus amici submit that the probability of deliberate, tactical choice is overwhelming, contrary to the court of appeals' opinion. That choice was wise, for reasons set forth infra in notes 3-4.

3 As the dissenting judge said in the court of appeals, "It is highly unlikely that a valid Brady claim can be drawn from this case." 724 F.2d at 404.

The Brady line of cases requires disclosure of evidence that is "favorable" or "exculpatory." E.g., United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). See also United States v. Bageley, 53 U.S.L.W. 5084, 5086-88 (U.S.S.Ct. July 2, 1985) (citing Brady requirements of "favorable" and "material" evidence; defining materiality as existing "only if there is a reasonable probability that . . . the result of the trial would have been different"). Respondent Carrier's claim, however, is that disclosure should be required under Brady whenever the information is merely "material" to guilt, even if it is not favorable or exculpatory at all. This argument is the claim Carrier now seeks to press. 724 F.2d 396, 399 (1983) (citing Carrier's argument); Respondent's Memorandum in Opposition to Petition for Certiorari at 2 (unprinted version). It is readily apparent that an experienced appellate lawyer would not have asserted this argument if he had any other arguments with any merit at all.

It is surprising that Carrier has argued "boldly," in the words of the dissenting judge, ". . . that he lost a 'sure thing' reversal." Id. at 405. He "lost" no such thing. Instead, again in the words of the dissenting judge, this extremely marginal claim was wisely not argued because "counsel undoubtedly recognized it as a weak issue." Id.

guided by the sound judgment of an experienced advocate.[4] Competent counsel would not file a brief with numerous less persuasive issues that might interfere with consideration of more persuasive ones. Instead, skillful counsel would do as counsel here did: He would select, from among those issues preserved for appeal, those few arguments that he considered most persuasive.[5]

Nevertheless, for purposes of this argument, amici will argue the issue as framed by the court of appeals. We assume, although convinced it is not this case, a case in which counsel has engaged in a "momentary" lapse through "inadvertence," and has therefore not objected to or briefed one among many issues, although counsel has rendered effective representation overall that has fully satisfied the sixth amendment.[6]

For the reasons that follow, amici submit that the existence of a momentary lapse by effective counsel should not result in the setting aside of state procedural rules. Specifically, the court

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4 Even Carrier here speculates that trial counsel's decision was a "willful abandonment" of what he persists, against all indications, in calling "the winning argument." Memorandum in Opposition at 4 (unprinted version, unnumbered note). The dissenting judge correctly describes trial counsel's decision as "both tactical and wise, as counsel undoubtedly recognized it as a weak issue." 724 F.2d at 405.

Indeed, the extreme unpersuasiveness of the claim which Carrier now so pathetically argues was his one "winning" argument, is itself an indication that the decision was tactical. See supra note 3.

5 See infra notes 7-8 and accompanying text; cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982) (discussing myriad of issues at trial and holding counsel effective even though he overlooks or omits arguments).

6 The court of appeals said, in fact, that in this case, "Carrier's trial lawyer appears to have performed with diligence and skill," except for his "unexplained failure to appeal the Brady issue." That failure is not "unexplained," but is instead clearly traceable to trial counsel's sound judgment that the Brady argument was meritless. See supra notes 3-4.

of appeals' approach would create a number of harmful results, some of which are discussed in the argument that follows.

1. The court of appeals' approach would force counsel to object to marginal issues and to forego his own judgments concerning the best means of defense, solely to prevent the possibility that later judgments by others may differ on ambiguous matters and may result in the labeling of his conduct as a "lapse" or an "error." The practice of law requires judgment. Often, the choices it presents are ambiguous. Usually, there are risks associated with every available choice. For example, the inclusion of a given allegation of error may appear to increase chances of reversal if it happens to persuade the court, but if other meritorious grounds also exist, the resulting proliferation of grounds may actually detract from the force of the presentation. For this reason, basic texts on appellate advocacy advise the attorney to limit his allegations of error.[7] Similarly, books on trial techniques advise the foregoing of many objections to evidence (a judgment that must be made under ambiguous circumstances, usually within one or two seconds of the event).[8]

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7 "[T]hose who write on appellate practice are unanimously in favor of limiting the number of issues in a brief . . . ." R. Martineau, Modern Appellate Practice: Federal & State Civil Appeals 183 (1978). "Selectivity is . . . essential." R. Stern & E. Gressman, Supreme Court Practice 764 (5th ed. 1983).

After-the-fact criticism of the appellate lawyer's judgment is especially easy because, even though there is a consensus that the issues need to be limited, "there is far less agreement on how the issues should be framed." R. Martineau, supra, at 183.

8 See J. Appleman, Preparation and Trial 842 (1967) ("Counsel should never object unless he has no fear of antagonizing the jury, nor unless he has a definite reason for wanting to keep something out of the evidence and is certain that he can do so successfully); 2 I. Goldstein & F. Lane, Trial Technique sec. 13.02 (1969) ("Objections should be used cautiously . . . .").

Again, second-guessing of a diligent attorney who follows this sound advice is relatively easy.

The court of appeals' opinion would interfere with the exercise of this judgment by rewarding the decision to brief every marginal issue and make every marginal objection. If an attorney failed to make this decision, he would risk being labelled "inadvertent" and as having committed "errors" or "lapses." Of course, the attorney will not be so described if the court reviewing his client's habeas corpus petition later happens to agree with his judgment; the point, however, is that criticism of his performance is unpredictable. Both the attorney's state of mind (i.e., whether he engaged in strategy or was simply "inadvertent") and the choice itself (i.e., whether the strategy, if indeed strategy was involved, was wise) are at issue. Both must be judged in hindsight, by ambiguous indications. Indeed, a good trial attorney may himself be overly critical, in hindsight, of his *own* judgment in an individual objection or argument, even though he has tried the entire case well and indeed even though the particular choice he later inwardly questions was entirely appropriate.

As a consequence of the decision below, a diligent attorney may unfortunately be motivated by the court of appeal's reasoning to reduce such second-guessing, at his client's expense. He can easily do so by suspending his professional judgment and simply objecting indiscriminately to every item of evidence (or by suspending judgment and briefing every conceivable appellate point whether persuasive or not). The court of appeals' approach clearly encourages this behavior by counsel. Conversely, counsel who exercises professional judgment by withholding marginal objections will be penalized, even if his judgment makes him more effective in representing his client. He runs the risk that a court will later disagree with his judgment and describe the withholding of a single objection as an error even though it is clear that counsel's overall performance has been fully competent.

In a lengthy trial, an attorney may be required to make hundreds or even thousands of individual judgments concerning when to object or what to argue. *Cf. Engle v. Isaac*, 456 U.S. 107, 134-35 (1982). It is no more appropriate to characterize such an individual judgment as a "lapse" or "error" than it is to similarly criticize a skilled tennis player who hits a single ball

into the net during a lengthy match. While a skilled tennis player could act with an excess of caution, making sure above all else that he hit no balls into the net, he would do so at great cost to his strategy and to his effectiveness in the contest. He would necessarily forego hard-hitting, vigorous strategies having any risk at all. The same would be true of an attorney who suspended his judgment and concentrated on presenting every objection or argument, irrespective of relative merit.

2. The court of appeals' approach would unfairly stigmatize loyal and competent counsel. The court of appeals' approach effectively obliterates the distinction between competent and incompetent counsel, by its unrealistic treatment of the judgments that competent counsel inevitably must make in trials. The most unfortunate direct effect of the lower court's opinion may be the stigma it places upon well prepared, skillful, and loyal defense counsel.[9] In this case, the defense attorney has been publicly determined by a federal appellate opinion to have in "great likelihood" committed an error affecting the defense of his client, owing to his probable "inadvertence." Even though amici submit that trial counsel acted appropriately and indeed skillfully in this choice, amici reluctantly conclude that he would be well advised to notify his malpractice insurance carrier of the court of appeals' characterization. Furthermore, he may well be required to disclose the court of appeals' evaluation of his performance upon applications for certification as a specialist in some States, or even in applications for admission to courts.

Such characterizations understandably prompt resentment in many competent practitioners. They contribute to a climate in which able lawyers often decline to engage in the important public service of criminal defense.[10] If counsel were indeed in-

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9 As one prominent Texas attorney has said in another context, such unfair treatment "will cut you to pieces . . . to such an extent that you will be quite angry, and it only has to happen to you one time and you will never take another criminal case." Speech by Luther Jones, quoted in Crump, The Functions and Limits of Prosecution Jury Argument, 28 S.W. L. J. 505, 537-38 & n.222 (1974).

10 See supra note 9.

effective, the label would be appropriate, and in that event its application would be justified by the interest in appropriate adjudication of constitutional claims. When, however, it reflects a single choice in a competently conducted trial in which many such choices were required, the stigma is not only unfair but is excessively costly to the criminal justice system.

3. The court of appeals' approach inappropriately encourages the perception in criminal defendants that their convictions are due primarily to failures of their attorneys. Few trials are perfect, but most are fair. Characterization of the outcome as dependent upon a momentary lapse of counsel, rather than as the result of a fair trial, converts acceptance of responsibility by a convicted defendant for his offense into blame for the system and defense lawyer that "caused" him to be convicted. The result is lessened respect for the criminal justice system and encouragement of abuse of the writ.

4. The court of appeals' approach tends to emphasize lesser claims that, in context and at the time of trial, are not highly significant to determination of guilt or innocence. By identifying and selecting for review those issues that counsel, at trial, failed or declined to preserve through "inadvertence," the court of appeals' approach tends to cause less significant issues to occupy the attention of federal courts hearing habeas corpus claims. Almost by definition, an issue that fully competent counsel has failed or declined to raise because of "inadvertence" is likely to be an issue of lesser significance than other issues, in the determination of his client's guilt or innocence. Ironically, it is precisely such less significant issues that the court of appeals' reasoning would most encourage to be presented in petitions for habeas corpus.[10a]

Furthermore, the court of appeals' "inadvertence" test encourages the taking of the grounds of error out of context,

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10a Amici curiae submit that the present case involves precisely such a situation. The omitted argument was omitted because it was insubstantial. See notes 1-4 supra.

divorced from such considerations as the length of the trial, the presence of other significant issues, and the importance of the ground in light of the remainder of the evidence. State procedural rules operating contemporaneously have a healthy tendency to motivate counsel instead to emphasize those matters that counsel considers most important to the determination of the guilt or innocence of the accused.

In this regard, the court of appeals properly recognized that "sandbagging" was *one* concern underlying *Wainwright v. Sykes, supra.* But the court of appeals failed to recognize that sandbagging is *not* the *only* such concern. *E.g., Stone v. Powell,* 428 U.S. 465 (1976) (federal habeas review of litigated fourth amendment issue not available, even though no sandbagging). *Sykes,* as well as *Engle v. Isaac, supra,* are properly understood as having the more general goal of concentrating habeas corpus upon the most deserving cases.[11] Thus numerous commentators have recognized that the bar extends to situations of inadvertence, because they have recognized that sandbagging is not the only concern.[12] Sim-

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11 Sykes, supra, itself lists many other reasons that may underlie a contemporaneous objection rule, including dealing with the matter while memories are fresh, deferring to the trial judge who could assess demeanor, contributing to finality, comity concerns, encouraging sound performance by trial counsel, and inducing the prosecutor to contemplate the error.

Sykes rejects the "sweeping language" of Fay v. Noia, 372 U.S. 391 (1963), particularly its "knowing-and-deliberate waiver rule which applied . . . to individual failures to raise individual substantive objections . . . ." 433 U.S. at 87-88 & n.12. The court of appeals has ignored this language in Sykes and resurrected the rejected "sweeping" approach of Fay and its progeny. Henry v. Mississippi, 379 U.S. 443 (1965), Townsend v. Sain, 372 U.S. 293 (1963).

12 E.g., Note, Habeas Corpus: The Supreme Court Defines the Wainwright v. Sykes "Cause and Prejudice" Standard, 19 WAKE FOREST L. REV. 441, 461-62 (1983); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, 126 U. PA. L. REV. 473, 508-09 (1978); cf. Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 466 & n. 190 (1980); Goodman & Sallett, Wainwright v. Sykes: The Lower Courts Respond, 30 HASTINGS L. J. 1683, 1717-1719 (1979).

ply put, a standard encouraging habeas filings, precisely *because* an issue was so insignificant that defendant's attorney was inadvertent to it, would have the topsy-turvy result of emphasizing habeas review of weak claims (such as the one in this case) rather than significant ones.

5. The court of appeals' approach would make habeas decisions depend heavily upon factual questions of the most indeterminate kind, concerning attorneys' states of mind. Straight sixth amendment claims of ineffective assistance of counsel are themselves often extraordinarily difficult to determine, even though the standard is an ostensibly objective one, and the trial transcript itself is usually the principal evidence by which the issue is determined.[13] By comparison, the determination required by the court of appeals' reasoning in this case would be far more difficult. To isolate a single choice by counsel, and determine whether it was the result of an inadvertent, momentary lapse as opposed to a reasonable choice (even though falling within the range contemplated by the sixth amendment), would require the court to probe the attorney's subjective mental state at the evanescent moment of the event. In *Strickland, supra* note 13, 104 S.Ct. at 2066, this Court was concerned that "Criminal trials resolved unfavorably to the defendant would increasingly be followed by a second trial, this one of counsel's unsuccessful defense." That effect would be magnified many times if the decision below were to stand.

The most relevant witness is likely to be the defense attorney himself, who will be dependent upon his recall of his thoughts at the time of one choice among many made during a contested trial. A candid response might put the defense attorney in the position of stating that while he does not fully remember his thoughts at the time, he believes that he made a correct tactical choice, but that there were matters he did not consider,

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13 Strickland v. Washington, 104 S.Ct. 2052, 2065 (1984).

Claims of ineffective assistance of counsel are among the most frequent grounds asserted in habeas corpus petitions, and among the most abusively asserted.

that time pressure affected the quality of the decision, that subsequent events have shown the matter to be more (or less) important than he thought at the time, and that the attorney was not then and is not now absolutely certain his choice was appropriate in any event. Such a scenario could apply easily in a case such as the present one. The court of appeals' glib characterization of such an action as presenting "great likelihood" of an error due to lapse or inadvertence conceals what is actually a complex fact finding by the court, made under a standard that is itself ambiguous.

Criminal convictions should not depend on such unreliable and subjective factors in the mind of counsel. *Strickland, supra.* They should instead depend upon an objective appraisal of the adequacy of counsel's performance. Nor should the valuable efforts of federal courts be channeled into inquiries likely to give such unproductive and inconsistent results.

6. The court of appeals' approach would decrease the ability of the federal courts to adjudicate meritorious habeas corpus claims. The sheer number of federal habeas corpus filings has been the subject of frequent commentary.[14] Habeas increases have been further augmented by enormous increases in other state prisoner petitions, particularly mandamus and 1983 claims; prisoner petitions now are 12% of federal dockets.[15] The habeas corpus docket includes cases of significant complexity; for example, capital cases invariably require extensive habeas scrutiny. Such cases often require delays on the order of a

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14 See, e.g., Allen, Schachtman & Wilson, Federal Habeas Corpus and Its Reform: An Empirical Analysis, 13 RUTGERS L. J. 675 (1982); BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: FEDERAL REVIEW OF STATE PRISONER PETITIONS—HABEAS CORPUS 1 (1984) (citing "dramatic increase (almost 700%) in habeas corpus petitions in the past 20 years").

15 BUREAU OF JUSTICE STATISTICS, supra note 14, at 2-3. While strict habeas filings have remained at a fairly constant level over the last decade, this entire category of prisoner petitions is the relevant category and has increased significantly.

decade for resolution, and they generate complex collateral questions such as the grant or denial of stays. Even with the inclusion of such serious cases (which presumably exhibit a much higher percentage of relief granted), the proportion of habeas corpus cases in which any kind of release results is exceedingly small.[16] The effort to identify meritorious claims amounts to a search for a needle in a haystack, and that is true even if the courts are not saddled with the disadvantages of the decision below.

Because the decision below would encourage abuse of the writ, it would have a negative impact upon the federal courts' ability to deal with this problem. That effect would be aggravated by the dependence of the outcome upon close issues regarding attorneys' states of mind, as well as by the tendency to emphasize lesser issues of the kind that counsel might overlook through inadvertence.

CONCLUSION

The decision of the court of appeals should be reversed. For the reasons stated by Petitioner Commonwealth of Virginia, the decision below is inconsistent with this Court's prior decisions and is particularly inconsistent with *Wainwright v. Sykes.* In addition, as this amicus curiae brief indicates, there are sound policy reasons for reversal, including the conclusion that the court of appeals' reasoning would cause significant harm while interfering with the fundamental purpose of habeas corpus jurisdiction.

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16 Allen et al., supra note 14, at 694 (1.7% released); BUREAU OF JUSTICE STATISTICS, supra note 13, at 5 (1.8% released). These rates indicate that emphasis on less meritorious cases will reduce attention in meritorious ones, and standards, such as that set by the court of appeals, will actually be counterproductive in that they will decrease the probability of release in the most meritorious cases.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ALLYN R. SIELAFF,
Director of the Virginia Department of Corrections,

Petitioner,

—v.—

CLIFFORD W. CARRIER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF THE RESPONDENT

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ISSUES PRESENTED

I.

Whether defense counsel's ignorance or negligence, falling short of a denial of effective assistance of counsel in the Sixth Amendment sense, can constitute "cause" for procedural default in state court within the meaning of Wainwright v. Sykes, 433 U.S. 72 (1977).

II.

Whether federal consideration of a prisoner's argument that counsel error constitutes "cause" in a particular case should be postponed until state remedies have been exhausted with respect to that issue.

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INTEREST OF

AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Virginia is one of the state affiliates.

The ACLU has long worked to protect the rights of criminal defendants and has filed many briefs, as counsel for a litigant or as amicus curiae, in cases requiring the construction of federal statutes and the interpretation of federal constitutional provisions related to criminal cases.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae.

STATEMENT OF THE CASE

This Court granted certiorari to decide whether the Court of Appeals correctly construed and applied the standards governing a state prisoner's access to federal habeas corpus for the adjudication of a federal claim that was not treated in state court because the state courts chose to rely upon an adequate and independent state procedural ground.

The prisoner, Clifford W. Carrier, was convicted in a Virginia court. At trial, his court-appointed attorney seasonably objected to the trial court's refusal to release to the defense certain witness statements in the hands of the prosecution. While the same complaint appeared in counsel's notice of appeal, it was omitted from counsel's brief to the Virginia Supreme Court. The record as it

now stands offers no explanation for the omission.

After the Virginia Supreme Court affirmed his conviction, the prisoner, proceeding pro se, sought state habeas corpus relief on the ground that the trial court's refusal to order the release of the witness statements constituted a violation of the due process clause of the Fourteenth Amendment. The warden moved to dismiss the petition because the due process claim might have been pursued on direct appeal. That motion was granted, and the Virginia Supreme Court denied review.

The prisoner again pressed the due process claim in a pro se petition for federal habeas relief, and, again, the warden moved to dismiss on the basis of procedural default. In an objection to a magistrate's recommendation that his petition be dismissed on that basis, the

prisoner alleged that the due process claim had not been raised on direct review because of "enefrective [sic] assistance of counsel." The district court accepted the magistrate's view that the state courts' reliance on procedural default to deny relief constituted an adequate and independent state ground of decision, making it inappropriate to entertain the claim in federal habeas in the absence of "cause" and "prejudice" within the meaning of Wainwright v. Sykes, 433 U.S. 72 (1977).[1] The district court also concluded that the prisoner could not complain that counsel's ineffective

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1 The "cause and prejudice" formulation in Sykes was fashioned for a case in which procedural default occurred at trial in state court, when the tactic known as "sandbagging" was at least conceivable. The default in this case occurred at the appellate stage, when counsel could no longer have been

assistance established "cause" because he had not exhausted state remedies with respect to that claim.

A panel of the Fourth Circuit reversed and remanded for a determination whether the prisoner could demonstrate "cause" arising from counsel's failure to pursue the due process claim on appeal, even

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"sandbagging" in the Sykes sense. All parties and all courts below have apparently assumed nonetheless that the "cause and prejudice" standards are applicable. With the case in this posture, and with no party having addressed this difficult question, it would be inappropriate to decide whether Sykes controls in a case of this kind. See Fay v. Noia, 372 U.S. 391 (1963)(employing the "deliberate bypass" rule in a case in which default occurred after trial); Reed v. Ross, 104 S.Ct. 2901, 2908 (invoking the "cause and prejudice" formulation in a case in which a state rule required "the exercise of legal expertise and judgment"). Cf. Mitchell v. Scully, 746 F.2d 951, 955-956 (2d Cir. 1984)(opinion of Friendly, J.)(preferring to reach the merits of a prisoner's claim rather than broach the question whether Sykes governs in a case in which the default was a

though counsel's inaction might not establish a violation of the Sixth Amendment. The panel's disposition was affirmed en banc. This Court granted the warden's petition for certiorari.

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failure to appeal directly from a criminal conviction). The stage at which default occurred in this case also makes it a poor vehicle for deciding what role the Sixth Amendment plays in habeas procedure. Cf. Evitts v. Lucey, 105 S.Ct. 830 (1985)(explaining that the source of counsel's performance standards on appeal is the due process clause).

We suggest, accordingly, that the writ be dismissed as improvidently granted. In the alternative, the Court may wish to remand to the Court of Appeals with instructions to return the case to the district court for thorough consideration of the appropriate standards for judging the federal effect of default at the appellate stage. Or the Court may wish to call for supplemental briefs. If the Court chooses to treat the Court of Appeals' analysis on the present record, it should be made clear that the applicability of the "cause" standard was not litigated below and is only assumed for purposes of the Court's opinion.

INTRODUCTION AND SUMMARY OF ARGUMENT

In general, litigants who put federal claims to the lower federal courts after those claims have been, or might have been, determined in prior state court litigation may expect to encounter arguments that relitigation is precluded. 28 U.S.C. § 1738. For more than a century, however, Congress has recognized federal habeas corpus as an exception to ordinary preclusion rules. Litigants who allege they are in custody in violation of federal law may litigate their federal claims in federal court as a sequel to state court proceedings. 28 U.S.C. §§ 2241-2254. The resulting framework is not without costs. Yet Congress has seen fit to engage those costs to ensure that habeas applicants have access to the federal forum.

Notwithstanding Congress' intention to make the federal forum available, this Court has held that the habeas courts may decline to open their doors in some instances in which litigants committed procedural default in state court and suffered dismissal on that adequate and independent state ground. In Sykes, the Court embraced the view that prisoners who forfeited state court opportunities to litigate because of procedural default may be foreclosed in federal habeas unless they demonstrate "cause" for the default and "prejudice" flowing from the federal error that went uncorrected in state court.[2]

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2 The idea of "cause" in the habeas context was originally borrowed from Rule 12 of the Federal Rules of Criminal Procedure. Davis v. United States, 411 U.S. 233 (1973). Rule 12 provides that criminal defendants forfeit the opportunity to litigate certain claims if objection

To date, the Court has not defined "cause" with precision--perhaps to avoid the rigidity that would follow an attempt to capture all possibilities in a fixed formula. Clearly, however, "cause" cannot be defined in a way that routinely bars state prisoners from the federal forum.

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was not made properly and seasonably in the trial court--except that for "cause shown" such defaults may be overlooked. The question, then, is whether the trial court is given some reason to grant relief from the forfeiture otherwise imposed by the Rule. In the typical case, "prejudice" to the accused establishes such a reason--"cause," that is, for permitting a litigant to pursue a claim notwithstanding procedural default.

In other cases, the Court has shifted the object of the "cause" inquiry in habeas away from a reason for granting relief from a forfeiture and toward a reason for the procedural default which invoked the forfeiture sanction in the first instance. Francis v. Henderson, 425 U.S. 536, 542 (1976); Sykes, 433 U.S. at 84. This transmutation of the "cause" idea typically focuses attention on the behavior of defense counsel.

The Court would do well to return to the original understanding of "cause," to

That would not only frustrate Congress' plan to provide habeas applicants with a second opportunity to litigate their federal claims, but would deny even a single opportunity to do so--the state courts having, by hypothesis, refused to treat those claims on the merits. Viewed

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merge the "cause" and "prejudice" inquiries, and, in the process, to eliminate the expenditure of federal resources otherwise required to identify "cause" apart from "prejudice." Should the Court find this course attractive, it would be appropriate to dismiss the writ in this case as improvidently granted, to remand with instructions to investigate the relationship between "cause" and "prejudice," or to call for supplemental briefs.

As this case now stands, it provides no occasion for refining the definition of "prejudice" as that term is currently used. We reserve comment on that question, whatever the relationship between "cause" and "prejudice."

realistically, a definition of "cause" which imposes a forfeiture of the federal forum as a matter of course when federal claims were not, but might have been, fully litigated in state court would give prior state proceedings the very preclusive effect that Congress has long forbidden.[3]

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[3] Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 n. 27 (1982)(recognizing Congress' intent to make habeas an exception to § 1738). Indeed, the preclusive effect would be more pronounced than anything this Court has recognized apart from habeas. Migra v. Warren City School Dist. Bd. of Educ., 104 S.Ct. 892, 898 n. 7 (1984)(indicating that "claim preclusion" rules may not be available for deployment against a federal plaintiff who was on the defensive in state court).

It hardly makes sense to propose that Congress means to free habeas corpus only from "issue preclusion" rules but to invoke "claim preclusion" rules against state prisoners--so that they are entitled either to two opportunities to litigate a federal claim or to none at all. Cf. Brown v. Allen, 344 U.S. 443, 552 (1953)(Black, J.). As cases such as Migra make clear, Congress must fairly be understood to hesitate more over rules which prevent litigation in any forum than over those

Procedural default is typically the product of defense counsel's behavior. The ascription of responsibility to counsel is, however, only the beginning of the inquiry in "cause" cases. No one doubts that "cause" is shown if counsel's failure to comply with state procedural rules constituted a denial of the defendant's independent Sixth Amendment right

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which force litigants to accept the judgment of the courts they initially approach. Inasmuch, then, as Congress plainly intends that habeas applicants be permitted a second opportunity to litigate, it strains common sense to suggest that the routine preclusion of claims that were not treated in state court is within Congress' contemplation.

to effective assistance of counsel.[4] In cases of that kind, indeed, the search for "cause" is beside the point; having established a violation of the Sixth Amendment, the prisoner is entitled to habeas relief on that ground--wholly apart from any other federal claim that counsel failed to raise in state court.

In the case at bar, the warden proposes something quite different. A Sixth Amendment violation, according to his

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4 There is language in some lower court opinions suggesting that an "allegation" of ineffective assistance will not establish "cause" for procedural default. E.g., Lumpkin v. Ricketts, 551 F.2d 680, 686 (5th Cir. 1977). The point is unexceptional. The mere "allegation" of counsel error could at most generate a dispute between the parties in habeas, which would then be resolved in appropriate federal proceedings. E.g., Goodwin v. Balkcom, 684 F.2d 794, 808-809 n. 17 (11th Cir. 1982)(distinguishing Lumpkin from a case in which ineffective assistance in the Sixtn Amendment sense is not only "alleged" but demonstrated).

argument, is not only sufficient to establish "cause"; it is essential. Specifically, the warden contends that defense counsel's ignorance or negligence cannot constitute "cause" unless the same behavior also denied the prisoner effective assistance in the Sixth Amendment sense. Furthermore, the warden insists that habeas litigants must exhaust state remedies with respect to any contention that counsel error establishes "cause" for procedural default in state court. Neither argument can be sustained.

In Part I of our argument, we explain that the proposed merger of the search for "cause" and an independent violation of the Sixth Amendment fails for a variety of reasons. It neglects the different concerns which generate Sixth Amendment doctrine, ignores precedents in which this

Court has found "cause" in the absence of a Sixth Amendment violation, renders the Court's line of procedural default decisions superfluous, creates serious doctrinal confusion, and threatens the objectives the Court has expressly pursued in the Sixth Amendment context.

We embrace the Court's consistent avoidance of rigid rules in this field, but suggest that the Court clarify both the relationship between "cause" and the Sixth Amendment and the way in which the distinction between deliberate, strategic actions and defaults due to ignorance or negligence figures in a proper analysis of "cause." We explain that the considerations which gave birth to the "cause" inquiry indicate that federal habeas corpus should be foreclosed only in some instances in which default

was the product of counsel's deliberate, knowing strategy.

In Part II, we agree that habeas applicants who raise Sixth Amendment claims as the basis for relief must ordinarily exhaust state remedies with respect to those substantive claims. We explain, however, that the exhaustion doctrine has no role regarding the different question whether counsel error establishes "cause." The federal question whether "cause" is shown belongs to the federal habeas courts' management of their own gates. The state courts have no interest in that issue; none of the values served by the exhaustion doctrine relates to it.

ARGUMENT

I. DEFENSE COUNSEL'S IGNORANCE OR NEGLIGENCE, FALLING SHORT OF A DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL IN THE SIXTH AMENDMENT SENSE, CAN CONSTITUTE "CAUSE" WITHIN THE MEANING OF SYKES

A. The Error of Merging "Cause" with a Substantive Violation of the Sixth Amendment

This case provides an opportunity to return to an issue left open in Sykes: "How should the federal habeas courts treat a state procedural default that is attributable purely and simply to the error or negligence of a defendant's trial counsel?" 433 U.S. at 100 (Brennan, J., dissenting). The warden's answer is deceptively simple. A federal habeas court should refuse to consider a prisoner's federal claim unless counsel's ignorance or negligence was so egregious as to amount to

a denial of the prisoner's Sixth Amendment right to effective assistance of counsel. Such a proposition cannot be credited.[5]

The Sixth Amendment standards against which defense counsel's actions must be measured were fashioned for an entirely different purpose and in response to entirely different concerns. The paramount question in a Sixth Amendment case is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on

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[5] Although the default in Sykes arose from defense counsel's behavior, the Court did not squarely consider whether the prisoner would be bound by an attorney's ignorance or negligence. Moreover, since the prisoner in Sykes expressly disclaimed any contention that counsel had rendered ineffective assistance at trial, the Court had no occasion to explore the relationship between "cause" and the Sixth Amendment. 433 U.S. at 75 n. 4. In Sykes, indeed, the prisoner offered no explanation at all for counsel's omission. Accord Davis v. United States, 411 U.S. 233, 243 (1973).

as having produced a just result." Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). The standards are admittedly low; judicial scrutiny of counsel's behavior is "highly deferential." Id. at 2065.

This Court explained in Washington that higher, more precise standards might undermine counsel's independence, restrict the range of counsel's tactical choices, encourage a proliferation of Sixth Amendment claims, dampen counsel's ardor, and undermine the trust between attorney and client. The Court also pointed out that it is difficult for reviewing courts to reconstruct the circumstances as they appeared to counsel and to distinguish incompetence from unsuccessful strategic maneuvers without "the distorting effects of hindsight." Id. The working idea in

Sixth Amendment cases, accordingly, is to establish and maintain a deferential posture with respect to counsel's actions and to identify constitutional error only when it appears counsel's misbehavior undermined the reliability of the defendant's conviction.

None of the considerations which inform the Court's treatment of Sixth Amendment claims is material to the entirely different question whether counsel's ignorance or oversight can constitute "cause" within the meaning of Sykes. Here, the question is not whether counsel's behavior met reasonable professional standards or, certainly, whether the prisoner must be accorded a new trial. The issue, rather, is whether a different federal claim, unrelated substantively to

counsel's performance, is to be denied a hearing in the federal forum.

Close scrutiny of counsel's behavior may arguably generate the difficulties the Court identified in Washington if the effect of federal second-guessing is the disapproval of counsel's work and the vacation of the conviction. When, however, the only consequence of finding "cause" is that a federal court will entertain an unrelated constitutional claim, those problems are not presented. To put the matter bluntly, the costs that flow from a finding of "cause" are dramatically lower than the costs of identifying a Sixth Amendment violation--requiring a new trial without more.

It is hardly surprising, then, that this Court has already found "cause" in the absence of a Sixth Amendment violation.

Only last Term in Reed v. Ross, 104 S.Ct. 2901 (1984), the Court held that the novelty of a legal theory at the time it might have been pursued in state court constituted "cause" for counsel's failure to raise it. None of the three opinions written in Ross suggested that the attorney in that case had failed to meet Sixth Amendment standards; indeed, the majority concluded that counsel had acted reasonably. Id. at 2910.

In Francis v. Henderson, 425 U.S. 536 (1976), the lower courts located "cause" in defense counsel's inexperience in criminal cases. Newman v. Henderson, 496 F.2d 896, 897-898 (5th Cir. 1974). This Court affirmed. While the Court focused on the question whether the prisoner must demonstrate "prejudice" as well as "cause" and thus did not deal explicitly with the

"cause" determination below, it hardly seems plausible that the Court would have sustained the circuit court if that court had misconceived the meaning of "cause." Cf. Estelle v. Smith, 451 U.S. 454, 468 n. 12 (1981)(rejecting a warden's procedural default argument "for the reasons stated by the Court of Appeals"); Smith v. Estelle, 602 F.2d 694, 708 n. 19 (5th Cir. 1979)(relying in part on two excuses for counsel's failure to raise a claim--neither of which touched upon the Sixth Amendment).

The warden's proposed merger of "cause" with a violation of the Sixth Amendment would make all the Court's cases on the effect of procedural default superfluous. For if a prisoner can establish an independent Sixth Amendment claim, habeas relief must be awarded without regard to

other federal claims that might have been, but were not, treated in state court. The point of the "cause" inquiry is to decide whether federal habeas courts will entertain federal claims that counsel's error kept from the state courts, not to make it immaterial whether those claims are examined.[6]

The argument urged on the Court today would collapse everything the Court has said about procedural default (from Brown v. Allen, 344 U.S. 443 (1953), through Fay

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[6] There are instances in which it would be important to dig beneath a meritorious Sixth Amendment claim and to reach the merits of the federal claim that counsel failed to raise in state court. The state may cure Sixth Amendment error by according petitioners another trial; some errors, in contrast, cannot be cured. In some former jeopardy cases, for example, prisoners should be entitled to litigate claims that counsel did not raise--in order to obtain release with prejudice to further state proceedings. E.g., Grandberry v. Bonner, 653 F.2d 1010, 1011 (5th Cir. 1981).

v. Noia, 372 U.S. 391 (1963), to Sykes, Isaac, and Ross) into substantive Sixth Amendment law. If the Court has meant for thirty years that the only federal claims cognizable in habeas are Sixth Amendment claims, it hardly would have erected the elaborate framework we have today--ostensibly for the purpose of deciding when other claims should be entertained notwithstanding a prisoner's inability to establish a Sixth Amendment violation.

The importation of Sixth Amendment standards into the definition of "cause" would also generate doctrinal confusion. The Court has made it clear that habeas applicants wishing to overcome default in state court must show both "cause" and "prejudice" flowing from the error that, because of default, went uncorrected in state court. The Court said in Washington

that litigants claiming violation of the Sixth Amendment must in most instances demonstrate not only that counsel's performance "fell below an objective standard of reasonableness," but that the defense was "prejudiced." 104 S.Ct. at 2065. If the Court were to incorporate Washington (including both "performance" and "prejudice" components) into the determination of "cause," habeas courts would be required to make two "prejudice" determinations--one to identify a Sixth Amendment violation establishing "cause" and another to satisfy the second prong of the "cause and prejudice" formulation. See, e.g., Tsirizotakis v. LeFevre, 736 F.2d 57 (2d Cir. 1984)(purporting to make two such determinations in a single case). Within a framework already criticized for

undue complexity, such a result would be impossible to justify.

Nor would it be plausible to borrow only the "performance" component of Washington as the measure of "cause" and to assimilate both "prejudice" questions into a single inquiry into the effect of counsel's oversight. Any attempt to substitute Sixth Amendment performance standards for a frank search for "cause" would be inconsistent with the well-settled understanding that isolated mistakes by counsel are usually insufficient to make out a Sixth Amendment violation. While "specific errors and omissions may be the focus" in some Sixth Amendment cases, United States v. Cronic, 104 S.Ct. 2039, 2046 n. 20 (1984), the primary issue in a Sixth Amendment case is typically whether counsel's behavior on the whole was so

unreasonable as to deprive the proceedings of their adversary character and to deny the client a fair trial. Counsel's failure to raise a particular claim seasonably in state court will rarely suffice--even if the result is procedural default under state law which works a forfeiture of any opportunity to litigate the underlying claim in further state proceedings.

If this Court were to hold that such defaults must constitute ineffective assistance to avoid similar forfeiture in federal habeas, the paradoxical signal to litigants and lower courts would be clear. Habeas applicants would be given an incentive to argue that isolated defaults by counsel establish Sixth Amendment violations. The lower courts, faced with the alternative of turning away facially meritorious constitutional claims, would be

pressured to sustain prisoners' arguments. For if this Court declared that the Sixth Amendment provides the applicable standard for the "cause" determination, the lower courts must assume that that standard will be met in some cases.

In the end, a holding that a Sixth Amendment violation must be established would encourage Sixth Amendment arguments precisely where they are now discouraged--cases in which it can only be shown that counsel overlooked an opportunity to raise a federal claim seasonably in state court. The analysis the Court has attempted to engender--an examination of counsel's overall performance as it relates to a fair and adversarial trial, would be skewed lest patent constitutional violations go uncorrected.

An attempt to collapse "prejudice"

within the meaning of Sykes into "prejudice" with the meaning of Washington would suffer similar frustration. The definitions of "prejudice" in these two contexts are and should be distinct. Compare Ross, 104 S.Ct. at 2908 (stating that "prejudice" within the meaning of Sykes is shown if, but for the default, the prisoner "might not have been convicted")(emphasis supplied), with Washington, 104 S.Ct. at 2068 (holding that "prejudice" in the Sixth Amendment sense is demonstrated only when there is a "reasonable probability" that, but for counsel's mistakes, the result "would have been different")(emphasis supplied).

This is only to be expected, given that the reasons for asking about "effects" in the two situations are quite different. The "prejudice" inquiry in the Sixth

Amendment context is undertaken to identify counsel mistakes which deprived the proceedings against the defendant of the adversarial character on which the system depends to ensure reliable results and which, accordingly, warrant overturning a criminal conviction. The paramount question, then, is whether the proceedings to date support a confident judgment that the defendant is guilty beyond a reasonable doubt.

In the habeas context, in contrast, "prejudice" is relevant only to a decision whether a federal court should exercise its equitable discretion to forego the exercise of jurisdiction squarely granted by Congress. The question in habeas is whether the prisoner should be allowed access to federal court for the litigation of a federal claim which, by hypothesis,

has never been treated in any other forum. It is most unlikely that these quite different objectives could be served by the same test for "prejudice."

B. The Proper Relationship Between Defense Counsel's Performance and "Cause"

The Court has previously avoided spelling out the explanations for default that will constitute "cause," and we see no greater reason to issue an exhaustive "guideline" opinion in this case. Cf. Sanders v. United States, 373 U.S. 1, 23 (1963)(Harlan, J., dissenting). It would be appropriate, however, to make several basic points to assist the lower courts in implementing Sykes while at the same time respecting, as the Court must, Congress' core expectation that state prisoners have access to the federal forum.

The key is to understand "cause" against the background of the concern which gave rise to that idea in the first instance. That concern is that the federal courts' availability for the litigation of federal issues should not undercut state attempts to secure compliance with state procedural rules. If the federal courts were to take no account of procedural default in state court, Sykes reasoned, defense counsel might be encouraged to engage in "sandbagging." That strategy, put simply, is deliberately to build federal error into state proceedings, to hope that the defendant will be acquitted anyway, but then to raise suppressed federal claims in habeas corpus later if the client is convicted.

Consistent with this reasoning, the habeas courts should decline to find

"cause" when barring federal litigation will deter counsel from "sandbagging" the state courts. Inasmuch as "sandbagging" is clearly a deliberate undertaking, it is arguably possible to deter it with a forfeiture sanction. Accordingly, counsel's deliberate, tactical maneuvers will not ordinarily suffice for "cause."

We understand Sykes to mean, at bottom, that prisoners may in some instances be held responsible for their attorneys' intentional tactics in state court--whether or not the prisoners themselves participated in those decisions. The only exceptions, it seems, are cases in which counsel's behavior dipped below Sixth Amendment standards[7] and cases in which counsel's deliberate choices were so "grissly" that it would be inappropriate to

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[7] See Garrison v. McCartny, 653 F.2d 374, 378 (9th Cir. 1981).

withhold federal review.[8]

Defaults flowing from counsel's ignorance or negligence cannot be deterred in the same way. Cf. United States v. Leon, 104 S.Ct. 3405 (1984). Barring federal habeas corpus on the basis of unintentional default in state court would add nothing to state attempts to encourage compliance with state procedures, but would most certainly frustrate Congress' plan to make the federal forum routinely available.

The root idea in Sykes is that habeas may be rationed to channel counsel's behavior into the appropriate tracks. The imposition of a forfeiture sanction in cases in which counsel were unaware of claims or the need to raise them in a particular way or at a particular

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[8] Sykes, 433 U.S. at 95 n. 3 (Stevens, J., concurring).

time, or cases in which counsel merely overlooked points or procedures of which they were generally cognizant, would come to something quite different--a bald value judgment, forged by the Court alone in the teeth of Congress' plan, that the federal forum should not be available to prisoners unlucky enough to be represented by inattentive lawyers.[9] Cf. Patsy v. Bd. of Regents, 457 U.S. 496 (1982)(conforming to Congress' wishes notwithstanding the Court's own doubts).

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9 Other considerations mentioned in Sykes as reasons for reinforcing state contemporaneous objection rules (the encouragement of litigants to raise claims when the evidence is fresh, the maintenance of "finality" in criminal cases, and the identification of the criminal trial as the "main event" in criminal prosecutions) are consistent with the view that unintentional behavior should not cut off federal review. The first assumes deliberate action; the other two are neutral with respect to the vital (intentional-unintentional) distinction which informs the Court's primary concern regarding "sandbagging."

This bleak picture cannot be avoided by resort to the fiction that counsel's failure to raise claims properly is generally deliberate and strategic. That simply is not true. To draw an inference of strategic behavior from counsel's omissions would plainly be to impute something to lawyers in a highly fictitious, formalistic fashion--without empirical support in any known data. It would only mask, and mask very transparently, a substantive decision to withdraw the federal forum arbitrarily from the very litigants whose (usually appointed) lawyers are functioning least well. These litigants are hardly able to enter the market to purchase better representation.

The Court has never embraced any such crude ideas. On the contrary, the Court has explained that the search for "cause" ordinarily will demand a serious

examination of the peculiar facts in each case. Jenkins v. Anderson, 447 U.S. 231, 234 n. 1 (1980). Logical inferences from counsel's behavior may well suggest deliberate strategy on occasion; direct testimony may lead in the same or a different direction. The task, in all cases, is to discover the historical facts by ordinary means, without reference to blanket rules that only smother the search for truth.[10]

The upshot is that, contrary to the district court's behavior in this case, the "cause" issue can rarely be determined on the face of prisoners' habeas applications--particularly if they

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10 The Court's analysis in the Sixth Amendment context does contemplate a "presumption" that counsel's behavior was tactical. Yet the values, and certainly the stakes, in that context are quite different--for reasons given above. Here the Court is not elaborating the constitutional minimal professional representation to which defendants are entitled, but is only clarifying a judge-made exception to a "head" of federal jurisdiction established by Congress.

are filed pro se. The federal habeas courts can, of course, draw attention to the "cause" issue and ask for clarification, additional allegations, or offers of proof. It may well be possible in some instances to reach a judgment on the existence of "cause" without holding an evidentiary hearing. Yet in the end it is essential that the fact-bound question of "cause" be determined in federal court through ordinary mecnanisms for making sensitive decisions of this kind.

C. The Meaning to be Drawn from Engle v. Isaac, 456 U.S. 107 (1982)

The warden relies on this Court's treatment of three consolidated cases, determined in the single opinion in Isaac. Counsel in those cases had failed to enter

a contemporaneous objection to an allegedly unconstitutional jury instruction and, for that reason, their clients had forfeited the opportunity to litigate that claim further in state court. In federal habeas, the prisoners contended, first, that the "futility" of the claim against the jury instruction at the time of trial established "cause" for counsel's failure to raise it, and, second, that "cause" was established by counsel's ignorance or negligence in failing to recognize that the jury instruction was vulnerable to federal attack on a novel theory.

The Court disposed of the first argument summarily--but in language which plainly contemplated that counsel's failure to raise a claim because of its perceived "futility" necessarily contemplated an awareness of the claim's existence: "If a

defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." 456 U.S. at 130.

Accompanying footnotes drove home the point that the Court's discussion of "futility" addressed only deliberate action by counsel. The Court quoted Justice Powell's concurring opinion in Estelle v. Williams, 425 U.S. 501 (1976), to the effect that counsel could not be allowed "deliberately to forego objection to a curable trial defect," id. at 515 (emphasis added), and recalled that even the Court's decision in Noia had condemned the "deliberate bypass" of state remedies.

U.S. at 130 nn. 35-36.[11]

The Court also rejected the claim that counsel's ignorance of a novel claim established "cause" in the cases at bar. Reviewing the case law at the time of the prisoners' trials, the Court concluded that counsel had had the "tools" with which to

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11 Even so, the Court in Issac refused to say that the apparent futility of a claim would never support a finding of "cause." 456 U.S. at 131 (stating that the Court "might hesitate to adopt a rule that would require trial counsel...to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim").

construct the argument. Then the Court said this:

> We do not suggest that every astute counsel would have [raised the federal challenge to the jury instruction]....Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit [this particular claim]...while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable consitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labelling alleged unawareness of the objection as a cause for procedural default. Id. at 133-134.

This passage addressed two analytically distinct matters. The key to its interpretation is to identify when it left the one for the other. That can be done only against the background of the brief filed on behalf of the prisoner in one of

the consolidated cases, Perini v. Bell. That brief dealt with defense counsel's ignorance of the federal claim in two ways. First, it argued that if the law was clear enough at the time of trial to put competent counsel on notice of a federal claim, then, in the absence of evidence of some tactical purpose, counsel's failure to raise that claim in season constituted ineffective assistance of counsel in the Sixth Amendment sense--which, in turn, established "cause." Second, whatever the claim's stage of development, counsel's ignorance of it established "cause" apart from the Sixth Amendment.

The quoted passage from the Court's opinion responded to both these contentions. The first five sentences addressed Bell's Sixth Amendment claim and found it wanting. Counsel's isolated

mistake in failing to raise a particular claim did not render his representation ineffective.[12] This was not to say, of course, that "cause" could not be shown without establishing a violation of the

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12 In this, the Court rejected the misleading syllogism that has occasionally obscured clear thinking in change-of-law cases. It is said that those who, like the ACLU, would locate "cause" in counsel's unintentional defaults mean to preserve the federal forum no matter what happened in state court. If a claim was known at the time it might have been raised in state court, then we insist that counsel's failure to raise it must have amounted to ineffective assistance in the Sixth Amendment sense and that "cause" should be found on that basis. Yet if the claim was not yet developed at the critical time, we insist that counsel's failure to raise it was understandable and, again, "cause" should be found. The Court's response, according to this account, should be to accept the syllogism in its own terms, to find "cause" only when counsel's error constituted a violation of the Sixth Amendment or when counsel made no error at all, but then to refuse to hold that an isolated failure to raise a generally known claim amounts to ineffective assistance in the Sixth Amendment sense. The result, of course, would be to limit "cause" to rare

Sixth Amendment. It was only to deny that "cause" was established in Bell on the basis of a meritorious Sixth Amendment argument.

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cases in which counsel either behaved very badly (in violation of the Sixth Amendment) or very well (making no error at all).

This proposal both misstates our argument in cases of this kind and understates the complexities with which the federal habeas courts must grapple. We do argue that "cause" should be found at the extremes--when counsel's error constituted a violation of the Sixth Amendment or when counsel made no error. Yet we hardly contend that every failure to raise a generally known claim amounts to ineffective assistance in the Sixth Amendment sense. There is a broad middle ground between the extremes. That ground is occupied both by counsel's deliberate, strategic omissions (regarding which "cause" ordinarily will not be found) and counsel's negligence or ignorance respecting generally known claims (regarding which "cause" should be found).

To overlook these distinctions, to suggest that all counsel error is either in violation of the Sixth Amendment or the basis for cutting off the federal forum, is both to ignore the reasoning which gave rise to the "cause" inquiry in the first instance and to frustrate the jurisdictional framework Congress has put in place for state prisoners.

The last sentence addressed Bell's argument that counsel's ignorance established "cause." Here, the Court's previous holding that the claim was generally known at the time of trial was critical. In the particular circumstances at bar, the Court was not prepared to accept the "allegation" that counsel had actually been unaware of the claim. The Court said nothing to suggest that in other circumstances, when the evidence in support of ignorance is stronger, "cause" will not be found. The Court, indeed, flatly refused to require lawyers to have "extraordinary vision." Id. at 131.

More recently, in Ross, counsel's ignorance has squarely been held to establish "cause." 104 S.Ct. at 2909 (stating that "the cause requirement may be satisfied under certain circumstances when

a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest").

Read closely and in full, the opinion in Issac hardly supports the warden's position in this case. The Court there dealt only with the particular arguments put by the parties in the particular circumstances of the cases before the bar. When the Court turned to the general definition of "cause," it expressly declined to paint with the broad brush the warden in this case insists was used. Id. at 1562 (intimating no intention to fill gaps left by Sykes). That prudent course should be followed again here. In this case, the Court need only clarify that

unintentional defaults by counsel do not bar the federal court house door.[13]

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13 We note as an aside that in the course of collecting the "costs" of postconviction habeas, the Court in Isaac mentioned in a footnote that counsel's failure to raise federal claims seasonably is sometimes due to ignorance and sometimes to deliberate strategy--as in the case of "sandbagging." 456 U.S. at 129 n. 34. That descriptive statement was clearly accurate. Yet the mention of both intentional and unintentional defaults in one paragraph scarcely suggested that the two would have the same effect on the

II. FEDERAL CONSIDERATION OF A PRISONER'S ARGUMENT THAT COUNSEL ERROR CONSTITUTES "CAUSE" SHOULD NOT BE POSTPONED UNTIL STATE REMEDIES HAVE BEEN EXHAUSTED WITH RESPECT TO THAT ISSUE

The exhaustion issue in this case is something of a red herring. As the Court of Appeals correctly pointed out below, state prisoners are ordinarily required to exhaust state remedies only with regard to their substantive claims for federal relief. The controlling statute explains that habeas is available only to prisoners

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availability of the federal forum. On the contrary, the Court was merely acknowledging that counsel's defaults are not always the consequence of "sandbagging"--the kind of behavior that does cut off federal review.

claiming a right to relief on the "ground" that they are in custody in violation of federal law and then refers to the use of state opportunities to raise "the question presented." 28 U.S.C. § 2254(a), (c). From the earliest cases, notably Ex parte Royall, 117 U.S. 241, 250-251 (1886), to the present, this Court's cases have plainly limited the exhaustion doctrine to claims "in a habeas corpus petition." Rose v. Lundy, 455 U.S. 509, 515 (1982)(emphasis supplied).

The warden would have it, however, that the exhaustion doctrine somehow relates to the matter of "cause." Even putting aside the absence of any support for such an argument in positive law, a moment's consideration reveals that it also lacks support in the exhaustion doctrine's rationales. As the Court explained in

Lundy, exhaustion is usually demanded to protect the state courts' role in the enforcement of federal law, particularly constitutional law, and to prevent disruption of state judicial proceedings. Id. at 518. State judges are sworn to uphold the Constitution; there may be great value in maintaining their role in the treatment of substantive claims which challenge the validity of state convictions. But the state courts have no interest in being involved in determinations that have only to do with federal gate-keeping. Just as they have no role to play in determining whether their grounds of decision are "adequate and independent" in the federal sense, and therefore sufficient to interdict Supreme Court direct review or to bring Sykes into play in habeas, they have no place in the search for "cause." The availability of

the federal habeas forum is a matter left, by statute and precedent, wholly to the federal courts.

Nor does the determination of "cause" relate to the proper functioning of state judicial proces s. As the Court explained in Royall, early federal intervention to evaluate state criminal defendants' federal claims touching the proceedings against them might disrupt the state courts' attempts to enforce the criminal law efficiently and, in the process, to attend to defendants' federal defenses. The matter of "cause," however, never arises in state proceedings. It is never presented for federal decision until state courts have finished their work. The concern lest federal habeas interfere with the state courts simply does not arise with respect to the "cause" issue.

The warden's reference to Alcorn v. Smith, 724 F.2d 37 (6th Cir. 1983), suggests a quite different argument. The Sixth Circuit did not propose in Alcorn that state remedies must be exhausted with respect to the federal question of "cause," but only noted that state prisoners' ordinary duty to present their substantive claims to the highest state court contemplates that they raise in state court any available state law bases for avoiding a forfeiture sanction for procedural default.

We do not discount the root idea in Alcorn. Would-be habeas applicants often have several avenues by which to satisfy the exhaustion doctrine; in most instances, it is a matter of federal indifference which path is chosen. If, however, prisoners fail to employ the procedures the state courts would prefer them to use, it

is common to find the exhaustion doctrine unsatisfied and to channel them back to state court and more appropriate remedies. E.g., Pitchess v. Davis, 421 U.S. 482 (1975) (finding an application for a state writ of prohibition no substitute for direct appeal).

The prisoner in Alcorn had squarely presented his substantive federal claim to the Kentucky Supreme Court on direct review, but that court had refused to consider it because of procedural default at trial. The prisoner filed a motion for rehearing alleging that the default was the result of counsel error and that it should, accordingly, be overlooked. That argument, too, was judged to be too late--but only inasmuch as it was raised in the form of a motion for rehearing at the appellate level.

The same allegation of counsel error might have been raised, according to the

Sixth Circuit, in a postconviction motion at the trial court level pursuant to Kentucky's ordinary postconviction remedy rule. Since that avenue was apparently still open, providing a means by which the prisoner might yet litigate his underlying federal claim in state court, the Sixth Circuit ordered his petition dismissed without prejudice to further federal proceedings after the prisoner had sought relief in the state courts in this conventional manner.

We have no substantial quarrel with Alcorn. If in the case at bar the warden means only that the prisoner should be asked to employ available and effective state court opportunities to persuade the state courts to overlook his attorney's default, then we can identify no threat to the congressional plan for protecting Mr. Carrier's genuine interests. Delays in

litigation are vexing in any circumstances, and a federal habeas court should think hard about requiring prisoners to make repeated trips to the state courts and, in the end, back to the federal forum. At some point, neither the interests of the prisoner nor the warden are served by making a fetish of exhaustion. Cf. Washington, 104 S.Ct. at 2060 (reaffirming that exhaustion is not jurisdictional).

Yet we are reconciled to the view that a prisoner whose substantive federal claim appears to be procedurally barred under state law may be called upon to present to the state courts, by reasonably identifiable means, a state law basis for overlooking default and reaching the merits. This appears to be the core lesson to be drawn from Pitchess and similar cases.

We leave to the parties and the district court the question whether such a state court opportunity remains open in this instance. Our concern is only to make clear that in no event is such further resort to the state courts to be understood as the exhaustion of state remedies with respect to the federal question of "cause." State law may well recognize exceptions to the ordinary forfeiture sanction in circumstances which mirror those associated with "cause" in federal habeas. The issue in state court is, however, one of state law alone. It is relevant to the availability of subsequent litigation in the federal forum only insofar as the state courts' use of the forfeiture sanction for default, and any exceptions, will be examined to determine the threshold federal question whether any

resulting state procedural ground is adequate and independent.[14]

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[14] It would be premature to speculate on the federal impact of any state court refusal to entertain Carrier's argument that his attorney's default should be overlooked pursuant to a state law exception to the ordinary procedural default/forfeiture rule. Indeed, if the warden is really arguing in this Court that the state courts remain open to such a contention, it would be inconsistent on his part even to make a procedural default argument in state court should the prisoner be routed back there. The warden's exhaustion argument has merit only insofar as it contends that federal habeas consideration of the prisoner's substantive claim should be postponed--not that federal review is forfeited.

We point out, however, that if the prisoner were forced to return to state court and were to be turned away yet again, this time because he committed procedural default in a second way by neglecting to present the state courts with a state law argument for overlooking counsel's anterior default, it would be far from clear that that state procedural ground of decision would invoke Sykes, such that the federal habeas court below would then ask the prisoner to show "cause" and "prejudice" with respect to his failure to raise a state law argument for avoiding dismissal for earlier default regarding a federal claim.

CONCLUSION

For the reasons given in notes 1 and 2, supra, we urge the Court to dismiss the writ as improvidently granted, to remand with instructions, or to call for supplemental briefs. In the alternative, we urge the Court to affirm the Court of Appeals' judgment. This case should be remanded to the district court. That court should first address the warden's argument that the prisoner has not yet exnausted

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Nothing in Sykes suggests that concerns about "sandbagging" could conceivably reach so far. In the typical case, prisoners can perceive no tactical advantage whatever in raising a federal claim in state court in a self-evident attempt to have it heard notwithstanding earlier procedural default, but withholding a state law argument for overlooking that default and treating the merits. The real explanation for default at this advanced stage is plain enough: counsel's ignorance or negligence.

There comes a time when efforts to respect comity and federalism, and the underlying values associated with them, give way to common sense. It would be

state court opportunities to persuade the state courts to overlook his attorney's default and to reach the merits of his federal claim. Issues of that kind are best treated at the district level, where a federal judge close to the parties, the case, and the state remedies that allegedly remain open can decide whether the values associated with the exhaustion doctrine would be served by routing this prisoner back to the state courts.

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sheer folly to order a federal district court to make <u>two</u> investigations of "cause" and "prejudice" (one to determine whether the prisoner should be barred from the federal forum for committing default regarding state law means of litigating federal issues and the other to determine whether, default respecting state law issues to one side, he should be barred for counsel's anterior default regarding an underlying federal claim for habeas relief).

Second, laying the exhaustion issue aside, the district court should investigate the facts and determine whether appellate counsel's failure to include the prisoner's due process claim in his brief on direct review in state court should bar federal habeas adjudication of that underlying claim. The primary question is why counsel acted as he did. If his omission was a deliberate strategy, "cause" should be found if his behavior constituted ineffective assistance of counsel in the Sixth Amendment sense. If he acted negligently or in ignorance, "cause" should be found without reference to the Sixth Amendment.

Should the Court wish to be more specific, we suggest the following formulation: The district courts should find "cause" within the meaning of Sykes if procedural default in state court can be

ascribed to counsel's ignorance, negligence, or inadvertence in failing to recognize and to fully appreciate the significance of a federal claim and its factual predicate, any state law requirements that the claim be raised at a particular stage of state proceedings or in any particular manner, or the consequences of failing to comply with any such state procedural requirements.

Respectfully submitted,

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